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No. 655

In the Supreme Court of the United States

OCTOBER TERM, 1935

C. H. ACKER, DOING BUSINESS AS C. H. ACKER & COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, HENRY A. WALLACE, SECRETARY OF AGRICULTURE, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLEES

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OPINION BELOW

The opinion of the District Court of the United States for the Northern District of Illinois (R. 1162–1170) is reported in 12 F. Supp. 776.

JURISDICTION

The decree of the District Court was entered on March 19, 1935 (R. 1171). Petition for appeal was filed on April 18, 1935 (R. 1172–1173), and was allowed on the same day (R. 1173–1174).

The jurisdiction of this Court is derived from Section 316 of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159, 168 (U. S. C., Tit. 7, Sec. 217), which provides that:

> * * * the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

Judicial review of the orders of the Interstate Commerce Commission was originally provided for by Section 1 of the Act of June 18, 1910, c. 309, 36 Stat. 539, commonly known as the Commerce Court Act, which conferred jurisdiction upon the Commerce Court over "Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (U. S. C., Tit. 28, Secs. 41 (28), 47), transferred the jurisdiction of the Commerce Court to the several District Courts of the United States, and provided that all suits to suspend or set aside an order of the Interstate Commerce Commission should be heard by three judges. Provision was made by the said Urgent Deficiencies Act for direct appeal to this Court (U. S. C., Tit. 28, Secs. 47, 345 (4)).

QUESTIONS PRESENTED

I. QUESTIONS RELATING TO THE METHOD USED BY THE SECRETARY IN FIXING THE PRESCRIBED RATES

A. Whether the Secretary in fixing the rates prescribed for the appellant livestock commission firms employed the method of rate determination approved by this Court in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420.

B. Whether the Secretary should have employed a well recognized statistical method in the determination of the reasonable functional unit costs upon which the prescribed rates are based.

C. Whether the Secretary in determining the reasonable functional unit costs upon which the prescribed rates were based improperly invaded the field of management.

D. Whether the Secretary used a proper test period for the purpose of determining reasonable functional unit costs.

II. QUESTIONS WITH RESPECT TO WHETHER THE EVIDENCE BEFORE THE SECRETARY WAS SUFFICIENT TO SUPPORT HIS FINDINGS

A. Whether the Secretary in determining the reasonable functional unit costs of the service furnished by the appellants made a reasonable allowance for salesmanship costs.

B. Whether the Secretary made a reasonable allowance for the cost of getting and maintaining business.

C. Whether the Secretary made adequate provision for the function of the entrepreneur.

III. MISCELLANEOUS QUESTIONS

A. Whether the appellants by their pleadings and proof have raised the question of confiscation.

B. Whether the Secretary properly denied the appellants' petitions for rehearing.

STATUTE INVOLVED

The relevant portions of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159, 168, are set forth in Appendix A, pp. 131–133, *infra*.

STATEMENT

This is an appeal from a decree of a statutory three-judge court for the Northern District of Illinois entered on March 19, 1935 (R. 1171). The decree dismissed a suit instituted by appellants to enjoin the respondents from enforcing an order of the Secretary of Agriculture dated January 8, 1934 (R. 188–189), and a supplemental order dated March 12, 1934 (R. 189–195), fixing the maximum rates chargeable by market agencies for the selling and buying of livestock at the Union Stockyards in Chicago, Illinois.

On September 23, 1932, the then acting Secretary of Agriculture, acting pursuant to the provisions of the Packers and Stockyards Act, 1921 (42 Stat. 159) entered an order of inquiry and notice of hearing against the market agencies engaged in the selling and buying of livestock at the Union Stockyards in Chicago, Illinois. The object of the inquiry was to determine the reasonableness of the

rates charged by such market agencies (R. 8). A hearing was held before an examiner beginning in Chicago, Illinois, on May 15, 1933, and continuing until August 18, 1933 (R. 8). The hearing was resumed in Washington on October 20, 1933, and continued until October 24, 1933, resumed again on November 3, 1933, and finally adjourned on November 7, 1933 (R. 69–70). Oral argument was had on December 13, 1933, before the Secretary (R. 9). On January 8, 1934, the Secretary issued his findings of fact, conclusion, and order (R. 62–189). The Secretary found that the existing schedule of rates contained charges which were unreasonable and discriminatory, and prescribed a new schedule of reasonable rates which was to become effective 30 days thereafter (R. 185–189). The effective date of this order was postponed to March 9, 1934, by an order of the Secretary dated January 23, 1934 (R. 190).

On February 7, 1934, appellants, who are market agencies operating in the Union Stockyards at Chicago, filed a petition for rehearing alleging that by reason of altered economic circumstances the rates prescribed by the Secretary would not produce sufficient revenue to defray their operating expenses (R. 9). The petition was denied on March 12, 1934 (R. 9). On the same date the Secretary promulgated a supplemental order (R. 189–195) which modified the order of January 8, 1934, by prescribing a schedule of rates higher in

numerous instances than those prescribed in the earlier order (R. 191–194). The effective date of the supplemental order was deferred by successive orders of the Secretary until April 20, 1934 (R. 10).

On April 9, 1934, appellants filed an amended petition for rehearing in which the same objection which had been made to the original order was asserted with reference to the supplemental order (R. 10). The amended petition was denied on April 12, 1934 (R. 10).

Thereafter, appellants on April 18, 1934, filed a petition in the District Court for the Northern District of Illinois, naming as defendants the United States, the Secretary of Agriculture, and the United States Attorney for that District (R. 1–29).[1] By the petition and complaint appellants sought to restrain the enforcement of the original and supplemental orders of the Secretary (R. 28–29) upon the ground that the rates prescribed therein were unreasonable and confiscatory (R. 13–26). The specific objections asserted with reference to the prescribed rates are too numerous to be set forth in this statement and are treated in detail in the argumentative portion of this brief.

On April 19, 1934, the District Court entered an interlocutory injunction restraining the enforce-

[1] It is erroneously stated on page 5 of the record that the petition and complaint were filed on January 31, 1935. The correct date is given in the opinion of the District Court (R. 1164).

ment of the orders of the Secretary upon condition that appellants deposit monthly in the Court the amount by which the rates collected under the existing schedule exceeded the amount which would have been collected under the rates prescribed by the orders of the Secretary (R. 195–197).

The case was heard on application for a permanent injunction on June 11, 1934 (R. 211). Appellants offered in evidence the record of the proceedings before the Secretary. In addition, the court received, over the objection of the government, the testimony of appellants' accountant and certain exhibits which he had prepared (R. 211–212).

On February 1, 1935, the court handed down its opinion (R. 1162–1170) and findings of fact and conclusions of law [2] (R. 1161–1162) and on March 19, 1935, entered a decree dismissing the petition, but continuing in effect the interlocutory injunction pending an appeal (R. 1171–1172). The court found that the findings of fact made by the Secretary were supported by substantial evidence and upon an independent consideration of the evidence received by the Secretary and of the evidence received by the court, adopted those findings as its own (R. 1161).[3] It concluded that as a matter of

[2] The opinion of the Court was dated February 1, 1934; the findings of fact and conclusions of law were dated December 31, 1934.

[3] Judge Wilkerson wrote a separate opinion in which he stated that he did not concur in the findings of the court which adopted *in toto* the findings of fact made by the

law the rates prescribed by the Secretary are reasonable and not arbitrary and that they do not take the property of appellants without due process of law in violation of the Fifth Amendment (R. 1161–1162).

Appellants' petition for appeal was allowed on April 18, 1935 (R. 1173–1174).

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants are attacking a schedule of maximum rates prescribed by the Secretary of Agriculture for the personal services rendered by them as market agencies in buying and selling livestock on commission at the Chicago stockyards. The schedule attacked was ordered, after full hearing, pursuant to the provisions of the Packers and Stockyards Act.

The schedule provided material reductions in the maximum commission rates chargeable by appellants for the personal services which they render. The exact extent of the reduction is difficult to measure because the structure of the schedule prescribed differs from the structure of the tariff in effect prior to the order. The old tariff provided maximum and minimum carload rates for arrivals of all species of livestock. The prescribed schedule provides rates which vary according to the weight of the animals in each consignment for each

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Secretary of Agriculture, but that he thought there was evidence to support the findings and that he therefore joined in the entry of the decree dismissing the bill (R. 1170).

species (except sheep), and which are graduated according to the size of the consignment.[4] The percentage of reduction brought about by the prescribed rates in any given year would therefore depend upon the size of the consignments arriving at the market and the weight of the livestock in each such consignment. Appellants claim that as applied to the business of four months in 1934 the prescribed rates would have reduced gross aggregate commissions approximately 20%.

In prescribing a schedule of maximum reasonable rates, the Secretary first determined reasonable unit costs (using a head of livestock as a unit) for each function performed by appellants in the handling of livestock. He then made findings as to a reasonable unit profit. On the basis of these findings, a schedule of maximum rates was prescribed sufficient to cover both the unit costs and the unit profits found by the Secretary to be reasonable and to provide a substantial margin over and above these unit costs and profits.

Appellants have stipulated that the schedule of maximum rates prescribed by the Secretary, if ap-

[4] The weight variations and size of consignment gradations employed by the Secretary in the orders challenged herein have apparently been accepted by appellants as a fair tariff structure inasmuch as the tariff which they submitted to the Secretary for filing on October 19, 1935 (which tariff is involved in the case of *United States* v. *J. M. Corrick, et al.*, No. 656), embodies the same variations and gradations.

plied to the business of all appellants in the test year of 1932, would have produced $493,941 in excess of the costs and profits found by the Secretary to be reasonable (R. 1179). This stipulation eliminates from the case any question as to the adequacy of the prescribed rates to yield the costs and profits found by the Secretary to be reasonable. Not only are those costs and profits covered, but a margin of almost half a million dollars over and above the reasonable costs and profits would have been yielded in the test year.

Appellants, however, challenge the reasonable costs found by the Secretary on the ground that they do not approximate the average costs actually incurred by appellants; and they attack the reasonableness of the rates prescribed by the Secretary on the ground that the revenue produced by the rates would not cover costs actually incurred and provide a profit.

The government submits that in the case of a business like that here involved, as distinguished from the usual type of utility, the lawfulness of prescribed rates cannot be determined by whether they are adequate to cover the actual costs incurred as the business has been carried on in the past, and yield a profit besides. Many of appellants, as will later be shown, conduct their business under such circumstances that they could not possibly make their actual costs and a profit under any schedule of reasonable rates, because the conditions

under which the business is carried on tend to increase the actual competitive costs beyond all reasonable bounds. Obviously, reasonable rates cannot be predicated upon unreasonable costs. The duty of the Secretary under the Act is to prescribe reasonable rates and the execution of this duty, therefore, involves a determination of what costs are reasonable as distinguished from what costs have actually been incurred. The past actual costs incurred by appellants do not, therefore, in and of themselves furnish a proper standard of costs, but must be adjusted and corrected to eliminate so far as possible those factors which have in the past made costs unreasonable.

Much of appellants' case rests upon the reiterated assertion that the Secretary has no power to manage appellants' businesses and that in finding reasonable costs he is attempting to assert such a power. This is a misstatement of what the Secretary has done. He does not assert any authority to prescribe or limit any of appellants' expenditures, but in prescribing reasonable rates it is necessary for him to estimate the costs upon which those rates are to be founded, and in doing this it is necessary that he determine costs which are reasonable. Appellants are in no way prevented thereby from incurring unreasonable costs. They are merely prevented from making the consumer defray those unreasonable costs.

There is nothing obscure or novel about the method of rate making applied in this case. It was considered by this Court in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, and the Secretary has used it in prescribing maximum rates for market agencies at Denver, Kansas City, Sioux City, Fort Worth, East St. Louis, Ogden, and Salt Lake City.[5] A comparison of the order litigated in the *Tagg Bros. & Moorhead* case with the order in the instant case reveals not only that the rate-making method employed in the two orders is the same but also that the rates here prescribed provide a larger margin of profit than did the rates prescribed by the order in the *Tagg Bros. & Moorhead* case (see Appendix B, *infra,* pp. 134–135). In this connection it should be observed that in the order involved in the *Tagg Bros. & Moorhead* case, no specific finding was made as to a reasonable unit profit (*Tagg Bros. & Moorhead* v. *United States,* R. 23–42), whereas in the order

[5] The rate orders involving market agencies at Denver and Kansas City are being contested. An appeal from a decree of a three judge District Court in the Western District of Missouri upholding the order prescribing rates for the Kansas City market agencies is pending in this Court. *Morgan* v. *United States*, No. 686. An appeal to this Court has been allowed from a decree of a three judge District Court in the District of Colorado upholding the Secretary's order prescribing maximum rates for the Denver market agencies. *American Commission Co.* v. *United States*, 11 F. Supp. 965. The Denver appeal has not yet been docketed in this Court.

attacked in the instant case the Secretary has specifically considered and made an allowance for profit.

One further matter should be noted. The findings of fact on which the Secretary based his order were made after lengthy hearings and after a thorough and detailed examination of the business of appellants. They were adopted *in toto* by the District Court after a trial *de novo* which involved an *independent consideration* both of the evidence before the Secretary and of new evidence produced by appellants in court.

Appellees' argument may be further summarized as follows:

I

The rates prescribed by the Secretary were determined by a lawful method. The Secretary found the actual functional unit costs of each market agency by a detailed audit and examination of its business. He then proceeded on the basis of all the information before him to determine the reasonable unit costs for each function performed by appellants. In addition he made an allowance for reasonable profit. On the basis of these findings the Secretary prescribed rates adequate to cover the costs and profits found to be reasonable together with a margin over and above those costs and profits. This is the same method of rate making which was used in the order upheld by this Court in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420. Appellants' objections to this

method of rate making are not sound. The statistical methods suggested by appellants as an alternative would not furnish sound criteria of reasonable costs. The test period used by the Secretary in determining reasonable costs was adequate. The determination of reasonable costs by the Secretary does not unlawfully invade the field of management.

II

The prescribed rates admittedly would have yielded in 1932 a margin of $493,491 over and above the costs and profits found by the Secretary to be reasonable.

III

The findings made by the Secretary are fully supported by the evidence. The record furnishes ample support for the Secretary's findings as to reasonable salesmanship costs. Appellants' attack on the salary figures used by the Secretary to determine reasonable costs is based on costs improperly padded by the inclusion of excessive appraised values for the services of the owners. The record contains abundant evidence of excessive and unreasonable expenditures for the purpose of getting and maintaining business and the Secretary's findings as to reasonable unit costs for those functions are fully supported by the facts. The record also furnishes ample support for the findings of the Secretary with respect to reasonable profits.

IV

The rates fixed by the Secretary are not confiscatory or unreasonable. The rates prescribed govern the charges which appellants may make for the personal services which they render. The amount of capital required for the business is small, and there is no dispute in this case as to the capital on which return has been allowed or the rate of that return. The rates prescribed by the Secretary cannot be confiscatory in the same sense in which rates might be which fix a return on physical property and capital. Appellants have no constitutional right to rates high enough to maintain all of them in business and to assure all of them a profit regardless of the economy and efficiency of their operation or the reasonable value of the services which they perform. Appellants have the burden of proving that the rates which the Secretary has prescribed are so arbitrary, capricious, and unreasonable that he has exceeded his statutory authority. Appellants have failed to sustain this burden.

V.

The Secretary properly denied the two petitions for rehearing which appellants filed with the Secretary. These petitions related to alleged changed economic conditions, but they were presented within two months and five months, respectively, after the close of the hearing before the Secretary. They did not contain allegations of any facts which could

not have been offered at the hearing before the Secretary, except those relating to business conditions at the stockyards during the comparatively short time which had elapsed since the record was closed. No sweeping economic changes had occurred during that period. The denial of the petitions for rehearing, therefore, did not constitute an abuse of discretion.

ARGUMENT

I

THE RATES PRESCRIBED BY THE SECRETARY WERE DETERMINED BY A LAWFUL METHOD

A. *The rates are designed to yield the reasonable costs of conducting business and a reasonable profit*

Section 305 of the Packers and Stockyards Act provides that all rates or charges made for stockyard services furnished by market agencies shall be just, reasonable, and non-discriminatory. Under Section 310 of the Act the Secretary of Agriculture is charged with the duty of investigating the reasonableness of charges made by market agencies and is authorized to determine and prescribe just and reasonable rates and charges. In the discharge of these duties the Secretary of Agriculture initiated proceedings to determine the reasonableness of the rates charged by the market agencies operating the Union Stockyards of Chicago and at the conclusion of those proceedings fixed the rates which are now attacked by appellants.

In paragraph 103 of his findings the Secretary of Agriculture has clearly stated the principle of rate making which he applied (R. 128):

> A method has been adopted in other commission rate determinations by the Secretary of Agriculture, pursuant to the terms of the Packers and Stockyards Act, and that method was approved by the Supreme Court of the United States in the case of *Tagg Brothers and Moorhead, et al.*, versus *United States* (280 U. S. 420). In that case, which is known as the *Omaha Commission Rate Case*, it was decided that the rates charged by a group of market agencies at a market for selling and/or buying livestock on a commission basis should produce gross revenues sufficient to pay all reasonable costs and a reasonable compensation for management and risk, that is, a reasonable profit, to owner or owners of all firms which receive enough livestock to enable them to handle their business in a reasonably efficient and economic manner. That principle is adopted as a guide in this proceeding, and it becomes necessary therefore to determine the reasonable costs to the respondents of handling each species of livestock.

The application of this principle by the Secretary in the instant case involved two steps:

1. THE DETERMINATION OF THE ACTUAL FUNCTIONAL UNIT COSTS OF EACH MARKET AGENCY

The material for this determination was largely furnished by an audit of the business of each mar-

ket agency in the years 1931 and 1932, made for the Secretary by government accountants. This audit is described in Paragraph 108 of the Secretary's findings (R. 131–132). It included an analysis of payrolls by individuals and functions for both years and a detailed study of the method used by appellants in buying and selling livestock and of the volume of business which they transacted. Compilations were also made of monthly variation of volume by firms and for the market as a whole, the varying number of head per consignment by firms for a 10-month period for 1932 and the varying number of head per draft [6] for each firm for two months of 1932.[7]

In addition to the audit, evidence was introduced at the hearing before the examiner showing the volume of livestock received at Chicago for all years from 1865 to 1932, the monthly receipts on the market for the years 1923 to 1932, the daily receipts for the year 1932, the shipments direct to packers for the years 1923 to 1932, and the through

[6] A draft is all those animals in one consignment weighed as a single sales or purchase classification.

[7] The audits were accepted by appellants as constituting a true reflection of the facts disclosed by their books and records for the period covered (R. 132), although they contended that the item of owners' salaries as shown by the books was not a true reflection of the worth of the services of these owners. See the discussion of this point at pp. 73–75, 102, *infra*. An accountant employed by appellants made a study for the purpose of determining costs and his determinations of functional unit costs differed somewhat from similar determinations made by the government accountants.

shipments for the same period (Resp. Ex. 12, Schedule 19–21).

On the basis of the audit and other statistics there was prepared a functional unit analysis of the operations of each firm for 1932 which (a) allocated to each species of livestock the income and costs which could be directly ascribed to it, and (b) further allocated income and costs to the various modes of arrival within a species (Gov. Ex. 49). In making this analysis, expenses were classified in three categories—salaries, other expenses, and interest. Salary expenses were further classified as selling and buying, yarding, business getting and maintaining, office and administrative (R. 133). Other expenses were further classified as yarding, office, business getting and maintaining, administrative and general, and risk (R. 133). Interest was calculated on the sound value of the fixed assets and on the inventory of supplies and the cash working capital equivalent to one month's expense allowance (R. 133). In paragraph 110 of his findings the Secretary explained that the year 1932 was used for this analysis because it was the year "next preceding the one in which the hearing was held." He also stated that receipts for the year 1932 were lower than they had been for a number of prior years and that a schedule of rates adequate to produce reasonable costs and reasonable profits in a low volume year should not prove to be too low in those years in which an increase in volume occurs (R. 133).

Having determined the actual functional unit costs incurred by each market agency in 1932, the Secretary proceeded to determine reasonable unit costs for each of the classifications of expense referred to above. These reasonable costs were determined by the exercise of judgment by the Secretary upon all the facts of record, including the unit costs incurred by each market agency. In making this determination the Secretary did not attempt to determine reasonable costs on the basis of an average cost derived from the application of any rigid mathematical method. If the Secretary had adhered to any mathematical average he would have violated the principle of rate making which he had laid down for his own guidance, that is, the determination of the unit costs which are reasonable for a market agency which receives a sufficient volume to permit its operation in a reasonably efficient and economic manner.[8] This is not to say that the Secretary ignored the actual experience of commission firms as to costs. It does mean that he exercised his informed judgment as to costs which should be regarded as reasonable and that he did not accept a cost figure as reasonable merely because it conformed to an average. To this exercise

[8] See the remarks of the District Court in *Tagg Brothers & Moorhead* v. *United States*, 29 F (2d) 750, 755, quoted at pp. 31–34, *infra*.

of judgment by the Secretary appellants strenuously object despite the fact that it was by the exercise of such judgment that the rates were fixed which were upheld by this Court in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420.

There is no mystery in the reasoning by which the Secretary determined reasonable costs. In his findings of fact he set out at length the evidence with respect to each function and the considerations which influenced his determination of the reasonable cost for that function.[9] At the conclusion of his examination of each of the classifications of expense the Secretary found a reasonable unit cost for each such classification and those costs are listed in paragraph 158 of his findings (R. 180) and in Appendix C of this brief, p. 136; *infra.*

Not only did the Secretary determine reasonable unit cost for the performance of each function, but in adddition he made a finding as to a reasonable allowance for profits to be covered into rates. This was done by determining the amounts which might reasonably be allowed per unit for management and uninsurable risks, which were classified as profits. This allowance per unit for profits was then added to the total of the functional unit costs previously determined. It was this total that was

[9] For example, salesmanship (Par. 120–134; R. 139–150), yarding (Par. 135–136; R. 150–154), office salaries and expenses (Par. 137–138; R. 154–160), business getting and maintaining expenses (Par. 139–145; R. 160–167), administrative and general expenses (Par. 146; R. 167–169), insurance and interest (Par. 147–148; R. 169–178).

used by the Secretary in connection with the determination of the unreasonableness of the existing rates and the preparation of a schedule of maximum reasonable rates (paragraphs 154–157 of the Secretary's findings, R. 178–180). The allowances for profit are also listed in Appendix C, p. 136, *infra*.

B. *The method used by the secretary in prescribing rates is the same as that which was approved by this court in Tagg Bros. & Moorhead* v. *United States*

In the order upheld by this Court in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, the Secretary applied the same principles of rate making which he used in determining upon the maximum rates now attacked by appellants. This is clearly demonstrated by the portions of the opinion of the District Court in *Tagg Bros. & Moorhead* v. *United States,* 29 F. (2d) 750, in which the rate-making principle was discussed. The court said (p. 753):

> * * * it falls to the Secretary, under the Packers and Stockyards Act, to consider what rate is high enough to compensate the efficient, low enough to restrain destructive scrambles for the business among too many agencies, and within the margin of the value of the service to the shippers, and on the whole case to fix reasonable rates, just to all; a most delicate function obviously, but, if necessary, possible.

And the District Court summarized the method used by the Secretary, as follows:

> (p. 753) * * * He accorded the parties in interest a hearing, and from oral evidence and extensive audits of each and all of the marketing agencies concerned the Secretary undoubtedly had data before him sufficient to build up a rate schedule. He had disclosed to him each and all of the details and items of expense that go to the performance of the function; he found a maximum reasonably chargeable for each detail, and, adding them together, he fixed a maximum charge for the whole service.
>
> (pp. 754–755) * * * There is no uncertainty about how the Secretary came to use the per car limit for selling as a cost item in service in arriving at the rates in his schedule. It was shown to the Secretary that some of the men who do this selling on the market sell a great many cattle, and some sell very few. Some are working for high wages, and some for much lower, and others again, as owners of the business, charge all there is left in the business, after paying expenses, to this selling job performed by themselves.
>
> The Secretary was not concerned with nor attempting to say just what a cattle salesman should be paid. It was his task to find a maximum per car for this work, beyond which anything charged would be unreasonable. To that end he considered how many cars a man could sell in a day, if he had the cars to sell, and also how many cars the men

> engaged actually do sell in the course of the business. From the whole the Secretary concluded that good cattle and sheep salesmen were being paid salaries of $5,000, and hog salesmen $4,000, and that any good cattle and sheep salesman can readily sell 1,000 cars of cattle or sheep in a year, if he has that many to sell, any good hog salesman could easily sell 1,333 cars of hogs in a year. There was in fact uncontradicted proof that each could sell many more cars. * * * The Secretary has not acted, then, on any mere theoretical estimation, but on actual experience as disclosed by the evidence. He finds from the evidence before him that the work can be done within the cost he has fixed as a maximum because it is being done.
>
> * * * * *
>
> The Secretary found a maximum for the other items of costs of carrying on the market agencies in substantially the same way that he arrived at the salesman cost. He refused to be bound by either the lowest cost he found or by the highest, or by any mathematical average. He found the cost which he deemed normal and reasonable, well below the highest and well above the lowest. As to each item there is proof that some agencies are getting the thing done in actual operation well within the maximum fixed.

Appellants attempt to distinguish the situation in the *Tagg Bros.* case from the instant case on two grounds. They first suggest that since the decision of *Tagg Bros. & Moorhead* v. *United States*

there has been a rapid change from rail to truck receipts and that livestock now arrives at the markets in smaller and more mixed lots. Appellants contend that these circumstances increase the number of sales required to dispose of a given number of cattle with a consequent increase in selling costs, and that the Secretary's order fails to take these changed circumstances into account (appellants' brief, pp. 48, 50). The mere fact that market conditions may have changed does not prove that the Secretary has here used a different rate-making method than he employed in the *Tagg Bros.* case. The only question raised by the difference in conditions is whether the Secretary's application of the method has made sufficient allowance for the change. Paragraphs 106, pp. 163–165 of the Secretary's findings (R. 130, 183–184) show that he took into account changes in market conditions. Unlike the tariff in the *Tagg Bros.* case, which used the carlot as the rate unit, the rates which the Secretary has prescribed here are based upon the consignment as a unit and provide for appropriate graduations in the charges according to the number and weight of animals in the consignment.[10]

[10] A consignment, for the purpose of assessing selling charges, is all the livestock of one species delivered in the name of one person to one market agency to be offered for sale during the trading hours of one day. A consignment, for the purpose of assessing buying charges, is all the livestock of one species bought at any time but shipped or delivered to one person on one market day (R. 191–192).

It is shown on pages 42–45, *infra*, that these graduated charges made adequate provision for the changed circumstances to which appellants refer.

In the second place, appellants attempt to distinguish the situation in *Tagg Bros. & Moorhead* v. *United States* on the ground that the salesmanship costs there found to be reasonable had a closer relationship to the actual salesmanship costs than do the salesmanship costs found to be reasonable here. In making this argument appellants contrast the salesmanship costs found to be reasonable by the Secretary in this case with what they allege to be actual salesmanship costs. In every instance in which this contrast is made, the actual costs claimed by appellants have been improperly padded by a hypothetical item representing the so-called appraised value of owners' services.[11] These appraisals were made by a committee appointed by appellants. The appraisals, which represent the

[11] Examples of cost figures used, which include these hypothetical appraisals, occur in the following places in appellants' brief: The table on page 40 of appellants' brief which states that the average salary for cattle and calf salesmen is $5,608.08 and that the salesman's salary per head on cattle and calves is $.4024; the statement on page 80 that the average cost of salesman's salary per head for cattle and calves is $.4024; the statement on page 82 that cattle salesmen on the average receive $1,108.08 more than the figure, $4,500, which the Secretary associated with the sale of 1,000 carlots of cattle; the statement on page 86 that $4,500 is $1,108 less than the average salary for cattle salesmen; the statement on page 92 that the average salary for sheep salesmen is $4,451.13 and for a hog salesman $4,183.93.

values which the committee placed on the owners' services, are excessive, and bear no relation whatsoever to the reasonable value of those services or to any amounts which the owners were actually paid. In many cases the appraisals are more than double the amounts actually drawn from the businesses by the owners. The appraisals do not represent actual expenses incurred by appellants. They are hypothetical expenses and cannot properly be included in any computations with respect to costs. No such padding of costs was attempted by the market agencies in the *Tagg Bros.* case.

In any event the alleged contrast between the costs in the *Tagg Bros.* case and those found here has little significance. Conditions in the two markets are doubtless different in certain respects and this difference affects costs. It cannot be assumed that there is the same relationship between reasonable costs and actual costs in the Chicago market as obtained in the *Tagg Bros.* case. More significant than any comparison of costs is the fact that the rates here fixed by the Secretary provide a larger return than did the rates fixed by the Secretary in the *Tagg Bros.* case. Appendix B shows that the rates fixed by the Secretary here as applied to the aggregate business of all of appellants in the test year of 1932 would have produced a profit of $1.05 per car in excess of the profit produced by the application of the rates fixed in the *Tagg Bros.* case to the aggregate business enjoyed by all of the market agencies in that case in the test year of 1925.

Appellants also suggest that although the Secretary has here applied the method used in the *Pagg Bros.* case in determining yarding and office expenses, he has departed from that method in determining reasonable costs of salesmanship (appellants brief, pp. 92–95). This alleged difference in method is deduced from the fact that the costs found to be reasonable for yarding and office expenses more nearly approximate the costs claimed by appellants to have been actually incurred than do the reasonable salesmanship costs found by the Secretary. The Secretary did not use one method for determining the reasonable costs of salesmanship and another method for determining reasonable yarding and office expenses. The argument that he did so rests upon the unsound assumption that because the salesmanship costs found to be reasonable by the Secretary and the costs he found to be reasonable for yarding and office expenses do not bear exactly the same relation to the average cost claimed to have been incurred by appellant for those functions, the two reasonable cost figures must necessarily have been determined by different methods. The reason why the costs found reasonable for yarding and office expenses bear a close relationship to actual expenses is not because a different method was used but because competitive conditions tend to maintain those costs at a reasonable level. The difference between the cost of yarding and office

expenses and salesmanship in this respect was pointed out by the Secretary in his findings in these words:

> In general, the expenses incurred by respondent firms fall into two classes. (1) There are those expenses which the conditions of the business tend to hold down. In this class are those expenses incurred for the performance of functions such as yarding and office work in which the persons employed are retained for the particular work to be performed and not for the amount of business which they may draw to the firm. (2) The second class of expenses is that in which the factor of control of business tends to increase the expenses of doing business. In this class are such expenses as those of salesmanship, and business getting and maintaining (R. 139).

It may be true that the costs found by the Secretary to be reasonable for yarding and office expenses are closer to the average costs claimed to have been incurred by appellants for these functions than are the reasonable salesmanship costs found by the Secretary to the actual salesmanship costs claimed to have been incurred by the appellants. This circumstance does not prove that the Secretary used a different method in determining the two cost items. It demonstrates merely that the actual expenses incurred by appellants for yarding and office expense more nearly approach

the standard of reasonableness than do the average expenses which they claim to have incurred for salesmanship.

C. *The statistical methods suggested by appellants would not furnish sound criteria of reasonable costs*

Appellants object that the Secretary in determining reasonable costs did not follow any "well known or well recognized experience method" (appellants' brief, pp. 79–92). Appellants disclaim advocacy of any particular experience method of determining costs, but they insist that the cost determined to be reasonable "should have some relationship to experience" (appellants' brief, p. 79). Analysis of appellants' argument on this point discloses that the substance of their contention is that the Secretary should determine reasonable costs by the mechanical application of some mathematical or statistical method, which would result in the derivation of an average cost or something closely analagous thereto.[12]

[12] Thus, at pages 87–89, appellants make a comparison of the costs found reasonable by the Secretary with costs found by the market median, the weighted average, and the 66⅔% bulk line methods. Each of these methods results in the derivation of an average cost or something closely analogous thereto. The median method takes the unit cost for that firm above which there are as many firms with lower costs as there are firms below with higher costs. The weighted average method takes an average unit cost weighted by volume of business. The 66⅔ percent bulk line method selects the highest unit costs incurred by any of those firms which do 66⅔ percent of the total business of the market at the lowest unit costs.

This contention is untenable. It was made in *Tagg Bros. and Moorhead* v. *United States,* 280 U. S. 420, and rejected by the courts. Indeed, the District Court in that case not only rejected the contention but pointed out why the use of averages by the Secretary would be improper. The court said (p. 754):

> Under these conditions, the Secretary declined to adopt averages of actual cost to the different agencies, and set before himself the task of finding the normal and reasonable cost per car of rendering the service for each species, cattle, hogs, and sheep. Then, itemizing the out-of-pocket cost apportioned on a per car basis for each species, he said that in each instance the figure adopted was "a normal of the actual cost of the particular item to those firms whose financial condition exhibits ordinary efficient management in their business."

There as here it was contended that the costs allowed were lower than the costs actually incurred, that the Secretary's order allowed no margin of profit, and that many of the market agencies would be driven out of business under the Secretary's rates. The District Court said with respect to these contentions (p. 755):

> * * * No one nor an average of all of the great many different extremes and variants of cost figures could be accepted as a reasonable standard. The audits for 1925

showed that this one item [salesmanship costs] from $4 to $20 per car; the firms with large business having lower costs. So the Secretary, in the exercise of his discretion and judgment, decided that $5 a car for selling cattle and sheep, and $3 per car for selling hogs, was as much as ought to be imposed upon the commerce. We cannot find in the record any grounds upon which the court has any power to set aside that conclusion.

The plaintiffs have caused elaborate audits to be made from the books of the agencies to show that, if each should charge up $5,000 a year on account of the services of each salesman employed or owner salesman in 1925, many agencies would have a balance in red at the end of the year, if the Secretary's schedule should be applied. Arguments are built up on this fact. It is a fact, and a very obvious one, but it in no wise tends to prove that the Secretary's order is oppressive or unjust. Those estimates are made by taking credit for expenses which the Secretary condemned as excessive and unnecessary.

Neither do we find the extensive computation concerning averages to be material. The audits show, and indeed it is obvious, that the Secretary did not find a figure of $5 a car for cattle and sheep salesman cost, and $3 for hogs, from any average of the costs to the different agencies. This salesman cost item was very high to some agencies and low to others. To add the two extreme figures together and divide by two,

and so reach an average, would be no indication whatever of what a reasonable cost was. No significance can be attached to the many ways in which the auditors have used their computations as to averages.

The shippers and public are entitled under the law to have the charges kept within a reasonable figure, and the Secretary is to judge of that upon evidence. The Secretary having exercised his judgment, the court cannot interfere, except on a showing that the Secretary was wrong. But merely to show that he did not adopt or apply a mathematical mean between two extremes in no way tends to show that he was wrong. On the contrary, the adoption of such a mathematical mean would, as in the case of jury verdicts, suggest gross error on the face of it. * * * He [the Secretary] refused to be bound by either the lowest cost he found, or by the highest, or by any mathematical average. He found the cost which he deemed normal and reasonable, well below the highest and well above the lowest. As to each item there is proof that some agencies are getting the thing done in actual operation well within the maximum fixed. In each instance there are some agencies that are not keeping within the maximum. Necessarily so. Undoubtedly, if rates were fixed so high that certain profits were assured to all regardless, the agencies would multiply much faster than live stock could be brought to the market, and an endless

> chain of rate increases would be necessary. * * *

Appellants also suggest that although the Secretary has purported to determine a "normal" cost, he has not in fact determined the normal cost, because "normal" means "average" or "ordinary", and that a normal cost can be determined only by some method which derives an average cost or something analogous thereto (appellants' brief, p. 83). But an average cost is not necessarily normal or reasonable. If the constituent costs which have gone into its composition are abnormal or extravagant, it reflects their abnormality and extravagance.

Appellants, in objecting to the failure of the Secretary to use some statistical method, attack his use of judgment in determining reasonable costs (appellants' brief, p. 85).[13] The mere fact that appellants believe that the statistical methods they advocate operate mechanically and without the exercise of judgment by the Secretary, is not necessarily demonstrative of the intrinsic merit of these methods. Appellants' argument on this point is obviously an objection to the fundamental basis of the rate-making method which was approved in *Tagg Bros. and Moorhead* v. *United States,* 280 U. S. 420, and is conclusively answered by that decision.

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[13] It is interesting to note that appellants rely heavily upon appraisals of the value of owners' services made by a committee appointed by appellants (R. 1092). These appraisals were made by an exercise of unfettered judgment.

D. The test period used by the Secretary was adequate

Appellants assert that the single year 1932 was an inadequate test period upon which to base findings of reasonable costs and profits (appellants' brief, pp. 109–113). They allege that this period failed to reveal variations in market conditions which take place over a longer period of time (appellants' brief, p. 109). In this connection it is significant that in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, the Secretary's findings were based on an audit made for a single year (*Tagg Bros. & Moorhead* v. *United States,* R. 400–699).

It is not entirely accurate to speak of the Secretary as having used 1932 as a test year. It is true that the functional unit costs set forth in the Secretary's findings were derived from analysis of the business of appellants for the year 1932 (par. 110, Secretary's findings, R. 133). The accountant for the Government, however, had prepared an audit and a functional unit cost analysis of the operations of each firm for both 1931 and 1932, and this material was before the Secretary when he made his findings (par. 109, Secretary's findings, R. 132–133). An exhaustive survey was also made of the economic history of the Chicago market and the factors which have influenced it since its establishment in 1865 (par. 9–42, Secretary's findings, R. 70–87) and the Secretary had before him data showing the annual receipts of the Chicago market

for each year from 1865 to 1932 (Resp. Ex. 12, Sched. 12) and also the monthly receipts of the market for the years from 1923 to 1932, inclusive (Resp. Ex. 12, Sched. 20).

In his findings the Secretary shows the volume of receipts of the Chicago market for each year from 1920 to 1932, inclusive, and the percentage of these receipts to the total receipts at the seven largest livestock markets in the United States (R. 72–73). A study was also presented showing the drawing power of the Chicago market as compared with other markets (R. 74–75). Figures were presented to show the ratios of rail and truck receipts for the years 1923 to 1932, inclusive (R. 76). Seasonal variation has been shown by a table presenting monthly variations in rail and truck receipts for 1932 (R. 77–78). Studies were made showing the distribution of receipts among the various species in each year from 1923 to 1932, inclusive (R. 86). It is clear, therefore, that the Secretary did not restrict his investigation to the operations of appellants for a single year; on the contrary, he considered not only seasonal variations but also long-period trends. That the Secretary also gave consideration to changing economic conditions which affect the Chicago market is clearly shown by paragraph 101 of his findings (R. 127).

Appellants assert that the Secretary selected 1932 as the test year *because* it was a low-volume year (appellants' brief, p. 110), but the record does

not support this assertion. The Secretary stated that his primary purpose in taking 1932 was because it was the year next preceding the one in which the hearing was held (Secretary's findings, par. 110; R. 133).[14] However, it is clear that in choosing 1932 the Secretary used a period which was favorable to appellants because the receipts of the Chicago market for 1932 were lower than those for any of the preceding ten years (R. 76). Functional unit costs calculated on the basis of the receipts of that year would naturally tend to be higher than those for the preceding years.

[14] In paragraph 110 of his findings the Secretary stated (R. 133):

> The rates hereinafter prescribed are based upon a general consideration of all facts of record. The functional unit costs set forth in this order are derived from an analysis of the business of each of the respondents for the year 1932. The year 1932 has been used for this purpose for the reason that it is that next preceding the one in which the hearing was held. The receipts for the year were lower than they were during the year 1931 and lower than they had been for a number of years previous. The use of a full calendar year gives due weight to the seasonal changes which take place in the marketing of livestock. A schedule of rates adequate to produce reasonable costs and reasonable profits in a low-volume year should not prove to be too low in those years in which an increase in volume occurs.

Examination of this paragraph fails to reveal the "prophecy" of increased receipts which the appellants read into it (appellants' brief, pp. 112, 113). The Secretary stated merely that rates which would produce adequate revenues in a year of low receipts should provide adequate revenue in years in which receipts were larger.

Appellants' own witness, Earle D. Mudd, testified in the hearings before the examiner that the unit cost per car for selling livestock was greater for all species in 1932 than in 1931 (R. 1088–1089). If the Secretary had used the figures for 1931 in arriving at the functional unit costs which he set forth in his findings, those costs would have been correspondingly lower and the reasonable unit costs determined by the Secretary would have reflected the decrease. Similar results would doubtless have followed if the Secretary had used a test period which included years prior to 1931. Finally, as the Secretary said in his findings (par. 110, R. 133): "A schedule of rates adequate to produce reasonable costs and reasonable profits in a low volume year should not prove to be too low in those years in which an increase in volume occurs." Appellants can hardly deny that in this respect the year 1932 was more favorable for them than a longer test period would have been.

The period selected as the basis for the determination of reasonable unit costs is not too short a time for the reflection of true market conditions. The situation here should be distinguished from one in which rates are fixed for a single utility. In such a case it may usually be necessary to take a period longer than one year in order to account for long range variations in the utility's experience. When rates are fixed for a large number of utilities with varying market experiences, a

shorter period of time is adequate. Changed conditions do not affect all market agencies in the same way or to the same extent. Even in a single year there is wide variation in their experiences. In a year in which the aggregate receipts of the market as a whole decline the receipts of some individual firms increase in volume. Thus while the market as a whole declined in volume in 1933, the receipts of thirty-eight firms increased in volume, although the receipts of fifty firms decreased (Pet. Ex. 2, R. 266–273). To some extent a similar situation exists when 1931 is compared with 1932 (Resp. Ex. 18, Sched. 10; Resp. Ex. 12, Sched. 14). This shows clearly that a single year provides a sufficiently wide variation in the experience of the individual firms to provide an adequate basis for the determination of reasonable unit costs.

The changes in the number and identity of market agencies operating at Chicago make it difficult to draw accurate comparisons of costs over long periods of time. Petitioner's Exhibit 2 (R. 266–273) shows that even in the period of two years and four months which is covered, numerous market agencies withdrew from business or were consolidated with others. The comparison of costs of firms which are now in operation with the costs of different firms which were in operation five years ago does not provide an accurate standard for the determination of reasonable costs.

Appellants contend that the production of livestock declined in 1934 and 1935 and that consequently the receipts of the Chicago market were very low in those years (appellants' brief, pp. 109–110). These circumstances, if they existed, afford no support to appellants' attack on the test period used by the Secretary. Appellants' contentions as to the effect of these changed conditions on their operations are inconsistent with the proof which they offered in the court below. Their Exhibit 2 (R. 266–273), as explained by their accountant (R. 253, 254), shows that market conditions improved during 1933 and the first four months of 1934 and that during that period there occurred a progressive reduction of the hypothetical deficit which appellants allege would have been produced by the application of the prescribed rates.

Appellants cite the decision in *Denver Union Stock Yard Company* v. *United States*, 57 F. (2d), 735 (D. C. Colo., 1932) in support of the proposition that the use of a single year provides an inadequate basis for rate determination. The situation in that case is clearly distinguishable. There the Secretary prescribed rates for a single organization, rather than for a large number having varied experience. Moreover, it was expressly stated by the court that in that case the Secretary selected for the test period the year in which the market receipts were the second highest in volume in the entire history of the market (p. 752).

Clearly the same objection cannot be made in this case, in which the Secretary employed a year in which receipts were unprecedentedly low.

Appellants also quote from the opinion of this Court in *West Ohio Gas Co.* v. *Commission*, 294 U. S. 79. In that case the rate-making body had before it data for 1929, 1930, and 1931, but selected for rate-making purposes only those figures which represented the business for 1929. It was the arbitrary selection of the earliest year, and the failure to consider the later years in which lower revenues were earned by the utility which was criticized by this Court. This Court said (pp. 81–82):

> We think the adoption of a single year as an exclusive test or standard imposed upon the company an arbitrary restriction in contravention of the Fourteenth Amendment and of "the rudiments of fair play" made necessary thereby. *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio* (appeal No. 1), decided herewith, *ante*, p. 63; *Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U. S. 165, 168. *The earnings of the later years were exhibited in the record and told their own tale as to the possibilities of profit. To shut one's eyes to them altogether, to exclude them from the reckoning, is as much arbitrary action as to build a schedule upon guesswork with evidence available.* * * * "Estimates for tomorrow cannot ignore prices of today." *Southwestern Bell Tele-*

> *phone Co.* v. *Public Service Commission of Missouri, supra,* at p. 288. We have said of an attempt by a utility to give prophecy the first place and experience the second that "elaborate calculations which are at war with realities are of no avail." *Lindheimer* v. *Illinois Bell Telephone Co.,* 292 U. S. 151, 164. We say the same of a like attempt by officers of government prescribing rates to be effective in years when experience has spoken. A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment. [Italics supplied.]

The situation in this case is not comparable to the one discussed by this Court in the language quoted above. As it has been pointed out, a test period inadequate for a single utility, may be adequate for a large number of utilities with varying experiences. Furthermore, the Secretary here has selected a test period which because of its high costs and low volume is more than fair to appellants.

E. *The Secretary properly based the schedule of rates upon the consignment as a unit and provided for appropriate graduations in charges according to the number and weight of animals in a consignment*

The schedule of maximum rates prescribed by the Secretary is constructed upon the consignment as the unit and provides for appropriate graduations

in charges according to the number and the weight of animals in a consignment.[15] In this respect the schedule of rates differs from the existing schedule of rates and the schedule prescribed in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, both of which used the carlot as the rate unit.

Although the appellants assign as error the failure of the lower court to find that the classification by the Secretary of livestock into grades depending upon weight and the prescribing of rates on a consignment rather than a draft basis was arbitrary, unreasonable, and without regard or relationship to cost (R. 1176), they do not strenuously press this objection to the basis of the rate schedule in their brief.

Indeed, appellants are not now in a position to contend that the Secretary should use the draft instead of the consignment as a rate unit. On October 19, 1935, appellants, purporting to act under the authority of the Packers and Stockyards Act, tendered to the Secretary for filing a tariff which employed exactly the same basis as that used by the

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[15] A consignment for the purpose of assessing selling charges is all of the livestock of one species delivered in the name of one person to one market agency, to be offered for sale during the trading hours of one day (R. 191–192).

A consignment for the purpose of assessing buying charges is all the livestock of one species bought at any time but shipped or delivered to one person on one market day (R. 192).

A draft is all of those animals in one consignment weighed as a single sales or purchase classification (R. 192).

Secretary in the tariff fixed by him in this case. Both used the consignment as the rate unit. Both contained weight classifications for cattle and calves, and for swine, and exactly the same weight divisions were used in each instance. Both make adjustments in rates according to the number of head contained in each consignment, the only difference being that the Secretary, in graduating charges according to the number of head in the consignment. employed three divisions while the market agencies employed two.[16]

It is not disputed that in recent years, livestock has been arriving in the Chicago market in smaller lots than was previously the case. There has been an increase in the number of consignments arriving by truck (R. 434, 471, 713, 754), and such consignments generally contain a smaller number of head than do consignments arriving by rail (R. 437–438, 592, 754). Even as to livestock arriving by rail there has been an increase in the volume which arrives in small lots (R. 855, 875). There is no doubt that the work of sorting, grading, and handling small mixed lots of livestock requires more time and effort than the sale of large lots of a single grade or species. It is this fact rather than anything peculiar to the mode of transportation which makes it more diffi-

[16] The tariff tendered to the Secretary for filing on October 19, 1935, is involved in the case of *United States* v. *J. M. Corrick et al.*, No. 656 on the docket of this Court. That schedule is set forth on pages 19–22 in the record of No. 656.

cult to handle livestock arriving by truck (R. 792, 714, 857, 981). It is also true that the process of selling livestock has increased in complexity. Buyers have become increasingly more selective in their purchases, and it is consequently necessary to sort livestock more closely than formerly (R. 528).[17]

It was because of these changed circumstances that the Secretary in setting up the schedule of rates abandoned the carlot unit used as the basis for the existing tariff and for the tariff prescribed in *Tagg Bros. & Moorhead* v. *United States*. The considerations which prompted this action are summarized by the Secretary in paragraphs 163–166 of his findings (R. 183, 185). By using the consignment as the rate unit and providing for modifications of charges according to the number and weight of animals in the consignment, the Secretary has made ample allowance for the extra time and effort now required to sell cattle as contrasted with the time and effort required when livestock arrived in larger lots.[18]

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[17] Evidence with respect to these changes in market conditions is found on the following pages of the record: 528, 745, 714, 767, 926, 1003, 999, 976, 954.

[18] The weight classifications provide for larger charges per head in the case of heavier types of livestock. Charges for the sale of consignments are progressively lower per head as the number of head in the consignment increases. See the schedule of charges set out on pages 191–194 of the record. These gradations in charges tend to compensate market agencies for the greater unit cost involved in handling small lots of mixed livestock. In view of the tariff structure, there

F. *The determination of reasonable costs by the Secretary does not unlawfully invade the field of management*

Appellants suggest that a determination of reasonable costs by the Secretary is an unwarranted and arbitrary interference with the management of appellants' businesses. In *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 439, this Court disposed of a similar contention in these words:

> * * * There is here no attempt to fix anyone's wages or to limit anyone's net income. Differences in skill, industry and experience will continue to be factors in the earning power of the several plaintiffs. For the order fixes only the charges to be made in individual transactions.

By determining reasonable unit salesmanship costs, the Secretary does not dictate to any market agency "what it can or must pay a cattle salesman" (appellants' brief, p. 81). It is misleading to sug-

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is no merit in appellants' suggestion in different sections of their brief that in prescribing rates, the Secretary has ignored the change in conditions and the fact that more time and effort is required to sell small mixed lots of livestock. See for example pages 48–50 and 90 of appellants' brief. At page 90 appellants contend that the Secretary in determining reasonable costs for salesmanship should have determined separate items of cost for small and mixed lots of cattle. This would have involved an unnecessary complication of the determination of reasonable costs. The Secretary determined reasonable costs on a per-head basis and then made ample allowance in his tariff structure for the additional work and expense involved in selling small and mixed lots.

gest, as appellants do, that the Secretary determined that "$4,500 is a reasonable price to be paid to a cattle salesman" (appellants' brief, p. 86), and that the determination of a reasonable cost for business getting and maintenance is the substitution of the Secretary's judgment for that of the owners (appellants' brief, p. 64). What the Secretary has done in the case of salesmanship costs is to associate a certain salary figure with the sale of a certain number of head in a year. This association is made for the purpose of determining unit costs and not in an attempt to fix salaries. It is not a determination by the Secretary that every salesman who sells a given number of head shall receive the designated salary or that a salesman who sells less shall not receive that or even a larger salary.

Nor is the determination of an allowance for unit costs of business getting and maintenance a determination as to the total amount which may be spent for those purposes. It is a determination of the amount which may be charged against the rate payers for those purposes, but nothing prevents the owner of a market agency from spending more than the allowance for business getting and maintenance if he wishes to do so, provided that he takes the excess from savings effected in other costs or from profits, or from the ample margin over and above reasonable costs and profits which the Secretary's rates provide.

II

THE PRESCRIBED MAXIMUM RATES ADMITTEDLY WOULD HAVE YIELDED IN 1932 A MARGIN OF $493,491 OVER AND ABOVE THE COSTS AND PROFITS FOUND BY THE SECRETARY TO BE REASONABLE

It is conceivable that in a rate case the question might arise as to whether the prescribed rates would in fact yield the costs and profits found by the regulatory authority to be reasonable. That question would involve a problem separate and distinct from the question of whether the findings of reasonable costs and reasonable profits were in fact reasonable and supported by the evidence.

But in the instant case, no such question can arise nor indeed have appellants tried to raise it. The adequacy of the rates prescribed to produce the costs and profits found by the Secretary to be reasonable is beyond dispute. Appellants have expressly stipulated that in the year 1932 the rates prescribed by the Secretary in the instant case, as applied to the composite and aggregate business of the appellants, would have produced a margin of $493,491 over and above the reasonable costs and reasonable profits found by the Secretary (R. 1179).

This liberal margin which the rates will yield over and above the reasonable costs and profits supplies additional revenue which in normal course will be additional profit. It also furnishes a cushion to offset any possible error which may have crept into the calculations made in determining reasonable costs. This margin, moreover, fur-

nishes a protection against possible temporary hardship which may occur from time to time through normal fluctuations in marketing conditions.

The undisputed presence of this liberal margin over and above the costs and profits found by the Secretary [19] to be reasonable considerably simplifies this case and narrows the issue in the final analysis to the reasonableness of the Secretary's cost findings and the sufficiency of the evidence on which they rest.

III

THE MATERIAL FINDINGS MADE BY THE SECRETARY ARE FULLY SUPPORTED BY THE EVIDENCE

Appellants' attack on the findings of fact made by the Secretary of Agriculture are chiefly directed

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[19] At first glance it might appear that the prescribed schedule does not adequately cover the costs determined to be reasonable because the rates per head for some of the livestock arriving in the larger consignments are less than the per head costs and profits found reasonable. (Cf. R. 180 and R. 186–188). But the schedule also shows that the rates per head for the livestock of each species arriving in the smaller consignments are higher as to each species than the per head costs and profits found reasonable for that species. While it could readily be demonstrated by a detailed analysis by size of consignment of the livestock arrivals during the test year that these higher rates for smaller consignments would more than offset the lower rates for larger consignments and that the maximum rates in the schedule as a whole will produce revenues liberally in excess of the total reasonable costs and profits for each species, such demonstration is unnecessary in view of the concession that the maximum prescribed rates would have produced in the test year substantially half a million dollars more than the total reasonable costs and profits as found by the Secretary.

at (1) the findings as to reasonable costs of salesmanship (appellants' brief, pp. 38–63), (2) the allowance for the cost of business getting and maintaining (appellants' brief, pp. 64–75), and (3) the allowance to cover profit (appellants' brief, pp. 76–79). This section of appellees' brief will deal with these findings, and the evidence which supports them.

It should be noted that the Secretary's findings were made on the basis of an investigation of the conditions existing in the Chicago stockyards over a considerable period of time, after a careful audit and analysis of the business of appellants in the years 1931 and 1932, and after the taking of testimony in lengthy hearings before an examiner. It is significant that the District Court, upon an *independent* consideration of the evidence before the Secretary and of the evidence tendered to the Court by appellants, adopted the findings of the Secretary *in toto* as its own.

A. *The Secretary's findings as to reasonable salesmanship costs are fully supported by the evidence*

The Secretary's findings with respect to salesmanship are found in paragraphs 120 to 134 of his findings (R. 139–150). In determining reasonable salesmanship costs the Secretary found it necessary to associate a designated salary with a certain performance figure. The Secretary concluded (par. 134; R. 149–150):

Upon consideration of the conditions under which salesmanship is performed on the Chicago market, the fluctuation of receipts from day to day and from season to season, the volume of livestock handled by the respective firms, the volume handled by various salesmen in a year, month, or day, and the estimates of witnesses as to what could be expected of a salesman, it is found that it is reasonable to associate a salesmanship performance of 27,000 head or above of animals of the bovine species with a salary of $4,500 and up; a salesmanship performance in the case of hogs of 87,000 head and above with a salary of $3,600 and above; and a salesmanship performance in the case of sheep of 270,000 head and above with a salary of $4,000 and above.

On the basis of this association the Secretary found that the following constitute reasonable per head costs to be covered into rates on account of salesmanship (R. 150):

Cattle and Calves	$0.1667
Hogs	.0414
Sheep	.0148

The determination of a relationship between a salary figure and salesmanship performance places no limitation upon what a salesman can do or may earn. It determines merely the reasonable per head salesmanship cost to be covered into a reasonable schedule of rates applicable to a unit of service. What a salesman may earn depends upon his

skill and ability and the volume of livestock available for him to sell.[20]

The determination of the relationship between a salary figure and a particular salesmanship performance is not to be misunderstood as the fixing of a salary by the Secretary. It places no limitation upon what a salesman can do or may earn but merely determines the reasonable salesmanship cost per head to be covered into a schedule of reasonable rates.

Appellant makes the contention, which will be answered immediately below, that the salesmanship performance of 27,000 head or above of cattle and the corresponding figures used by the Secretary with reference to sheep and hogs are higher figures than the evidence warrants. It is to be noted at the outset that the Secretary does not assume in determining his reasonable unit costs that every salesman will meet these performance figures. He merely associates these performance figures with salesmen receiving an annual salary of $4,500 and up. Approximately 75% of the employed salesmen now engaged in the sale of cattle receive annual salaries of less than $4,500 and the median salary received by salesmen of this class is $3,204. Approximately 60% of the employed salesmen engaged in selling hogs get an annual salary of less than $3,600 (the figure used by the

[20] See the discussion of this point on pages 46–47, *supra*.

Secretary in determining reasonable costs) and the median salary received by such salesmen is $3,322.50. Approximately 68% of the employed salesmen engaged in the sale of sheep receive an annual salary of less than $4,000 (the figure used by the Secretary in determining reasonable costs) and the median salary of such salesmen is $3,041.29. (Gov. Ex. 49, pp. 283–285.) Even, therefore, if it should turn out that a considerable proportion of the salesmen in the business do not measure up to the salesmanship performance associated by the Secretary with a salary of $4,500 a year, this does not of itself vitiate the Secretary's computation of reasonable costs since it is to be assumed that in the future, as at present, the larger number of salesmen in the industry will not receive that salary.

1. THE SECRETARY'S SELECTION OF FIGURES AS TO REASONABLE SALESMANSHIP PERFORMANCE FOR USE IN DETERMINING REASONABLE UNIT COSTS IS FULLY SUPPORTED BY THE EVIDENCE

The determination of reasonable unit costs to be attributed to salesmanship must necessarily be predicated upon a decision as to the volume of business which can be handled effectively by a competent salesman who receives a volume of business sufficient to utilize his time with a fair degree of efficiency.

In considering the question of salesmanship performance, the Secretary examined the salesmanship records of the market agencies at the Chicago

stockyards. Calculations were made by both the government accountant and the accountant for the appellants with respect to actual salesmanship performances in 1932. The government accountant considered only the time spent in the selling or buying function, eliminating such time as was spent by salesmen in yarding, business getting, and other functions (R. 653). The accountant for the appellants in most instances considered the full time of each employee who did any selling at all as having been entirely spent in selling without eliminating any time spent in yarding, business getting, or other activities (R. 1082).

The calculations of the government accountant show that the following eight firms had a high calves in 1932 (number of salesmen taken from Gov. Ex. 49, pp. 280–282; total carlot figures taken from Resp. Ex. 12, Sched. 14): [21]

Firm No.:	*Cattle and calves* — *Number of carlots or carlot equivalents per salesman in 1932*
18	1,668
4	1,355
48	1,236
66	1,210
92	966
24	951
56	909
71	900

His calculation showed that the following firms had a high average salesmanship performance per salesman for hogs (number of salesmen taken from

[21] According to calculations made by the accountant for appellants, there were only two firms whose salesmen sold an average of 1,000 cars of cattle and calves in a year (Resp. Ex. 12, Sched. 24).

Gov. Ex. 49, pp. 280–282; total carlot figures taken from Resp. Ex. 12, Sched. 14): [22]

Hogs	*Number of carlots or carlot equivalents per salesman in 1932*
Firm No.:	
85	1,488
4	1,186
12	1,080
23	965
78	1,020
51	985
38	944
63	972
83	906
93	902

For sheep the computations of the government accountant showed that the following two firms had a high salesmanship performance (number of salesmen taken from Gov. Ex. 49, pp. 280–282; total carlot figures taken from Resp. Ex. 12, Sched. 14): [23]

Sheep	*Number of carlots or carlot equivalents per salesman in 1932*
Firm No.:	
57	2,205
18	1,319

Appellants suggest that the experience of market agencies with a high salesmanship performance should have been disregarded by the Secretary in determining salesmanship costs because those agencies have a clientele which makes it possible for them to dispose of livestock in larger lots

[22] According to the computations of the accountant for appellants, there was no market agency whose salesmen sold an average of 1,000 carlots of hogs in 1932.

[23] The computations of appellants' accountant show that the average sales per salesman for these two firms exceeded 1,035 carlots.

or drafts [24] than do many of the other market agencies. They contend that the high salesmanship performance of such firms is wholly the result of this ability to sell livestock in comparatively large lots or drafts. They have set forth on page 38 of their brief a table which purports to demonstrate that as the average number of head per sale or draft goes down, the average number of cars sold per salesman goes down also.[24] There is no doubt that to a limited extent there is a relationship between the average number of head in each sale transaction or draft and salesmanship performance, but the size of the lots or drafts is not decisive or controlling so far as salesmanship performance is concerned. This is shown by the following table, based on information contained in Respondent's Exhibit 12, Schedules 13, 16, and 24:

Cattle and Calves

Name of firm	Total head *sold only*	Total drafts or sales	Average number of head per draft or sale	Average number of cars sold per salesman
C. H. Acker & Co	519	86	6.03	22
Wm. Daniel	2,106	281	7.49	90
Walter Bros	5,133	1,281	4.01	97
Louis Ambrecht & Co.[1]				
L. S. Werden	3,853	2,157	1.79	143
Drovers Commission Co	48,521	10,098	4.81	562
Lawler Bros	157,137	31,214	5.03	642
Kuenster Livestock Commission Co				
Stafford Bros	[2] 129,069	27,739	4.65	744
Sullivan Commission Co				
Quinn Commission Co				
National Livestock Commission Co	139,057	23,898	5.82	1,043
John Clay & Co	147,790	20,084	7.36	1,139

[1] Ambrecht is cleared by Walter Bros.

[2] These firms were listed together by the accountant for appellants in determining the average number of cars sold per salesman.

[24] See the definition of a draft on page 18, *supra*.

This table shows, for example, that the average number of head per draft sold by the firm of William Daniel was 7.49, the average number of head per draft sold by John Clay & Co., was 7.36. Yet the salesman of John Clay & Co. sold an average of 1,139 cars as against an average of 90 cars for the salesman of William Daniel. Here, then, are two firms, both of which sell cattle and calves in lots of approximately equal sizes, yet the salesmanship performance of one is very high and the salesmanship performance of the other low. It is obvious that the explanation for the poor salesmanship performance of some of the appellants is not to be found in the small number of head per draft.

Appellants contend that the experience of market agencies with a high salesmanship performance is not typical,[25] that the average for all market agencies is much lower than the figures used by the Secretary,[26] and that these circumstances show that the Secretary's findings were made in disregard of the facts. The contrast between the salary and performance figures associated by the Secretary, on the one hand, and the market averages claimed by appellants, on the other hand, has little significance. In associating certain figures the Secretary

[25] See for example the discussion on pages 36 and 37 of appellants' brief.

[26] See for example the contrast made on page 25 of appellants' brief.

was not attempting to determine an average performance or an average salary. He might with propriety have taken lower salary and performance figures. In that event, deviation from and contrast with market averages would have been much less striking.[27] The basic deficiency in this objection of appellants is that it assumes that the Secretary should have been guided by the experience of the average market agency. Appellants disregard the fact that the rate-making method used required the determination not of average costs but of the costs of a market agency which is in a position to operate in an efficient and economic manner. Appellants' objection in essence is not an objection to the weight of the evidence upon which the Secretary has acted but against the rate-making method which he has applied. Appellees do not contend that the market agencies whose salesmanship performance equals the figure used by the Secretary are "typical" or "average" in the sense in which appellants use those words. They do contend that the experience of those market agencies shows what can be done by the salesmen of a market agency which utilizes

[27] For example, the Secretary might have associated a salary of $2,250 with the sale of 500 carlots of cattle or calves. The salary figure would have been lower than the market average and the performance figure would have been approximately equal to the average salesmanship performance as that average was computed by the Government accountant.

the services of the salesmen in an efficient and economic manner.

The use of market averages as criteria of the reasonableness of the Secretary's findings is particularly objectionable because the experience of many market agencies has no probative value whatsoever. There are many firms whose volume of business is so small that their experience cannot be used as a standard in determining reasonable costs. The extremely small annual volume of business transacted by some of the appellants is shown by the following table (Respondents' Ex. 12, Schedule No. 24–A):

Name of Firm	Number of Salesmen	Number of Car Equivalents of Cattle and Calves
C. H. Acker & Company	1	22
Adler & Sons Co. (9 mos.)	¾	138
William Daniel	1	90
Fred Freeman	1	40
I. O. Fry	1	68
G. F. Hogan	1	11
Lambright, Keys & Houston	2	245
Charles H. Moberly	1	52
Nalley Commission Company	4	628
Schroeder Commission Company		
W. C. Patterson	1	164
Pritchard Commission Company	2	178
A. P. Schmal (11 mos.)	1 11/12	97
J. E. Strader	1	42
Walter Bros	2	194
Louis Armbrecht		
L. B. Werden	1	143
	20¾	2,112

The average number of cars per man for these small-volume firms is slightly over 100 cars per man per year. Obviously, the actual experience

of these firms is not an adequate test of the Secretary's finding that a salesman may sell 27,000 head (or approximately 1,000 carloads) of cattle and calves per year if he has that many to sell. A firm may receive even 200, 300, 400, or more carloads of cattle and calves per year and maintain one or two full time cattle and calf salesmen, and yet its experience could not furnish any material basis upon which to judge whether a salesman may reasonably sell 1,000 carloads per year.[28]

A commission firm need not be one of the larger firms in order to have a high salesmanship performance per man. It is a matter of adjusting the number of salesmen to the volume of business handled. Some of the smaller firms make a relatively better showing than some of the larger firms because they keep their salesmanship costs somewhat in harmony with the volume of their business.

The fact is that many market agencies operate under such conditions that their present organizations and scale of operations cannot be regarded as efficient or economic and neither the existing rates nor any reasonable rates would enable them to pay the present costs of their operations and

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[28] The testimony of Howard M. Gore, one of appellants' own witnesess in the hearings before the examiner, supports the propriety of disregarding the experience of firms with a low volume of business in determining reasonable costs. For example, Mr. Gore testified that he did not believe that a rate should be fixed high enough to enable a firm which received only thirty-seven carloads of cattle in one year to continue in business (R. 1148).

provide a profit besides. There was testimony given in the hearings indicating that there were more firms operating on the market than are necessary to handle the volume of business (R. 319, 322, 551, 734–735). In fact a member of one of the appellant firms testified that he did not believe all the firms were operating at full capacity (R. 734).

The over-expanded condition of the industry in the Chicago stockyards is best illustrated by the current practice whereby several small-volume firms may be "cleared" by, or purchase service from, larger firms. A number of the smaller firms receive insufficient business to enable them to meet the overhead expenses incident to the maintenance of a complete market agency establishment. Accordingly, these firms frequently enter into arrangements with larger firms whereby the latter attend to certain details of the business of the former. For this the smaller firm pays to the larger a portion of the commissions earned on the livestock which the smaller firm receives, and continues to hold itself out to its patrons as an independent market agency.

The Secretary found that there are only 23 firms on the market which handle their own business exclusively and have no clearing arrangements, and that there were 32 other firms engaged in clearing 51 other firms (par. 66, Secretary's findings, R. 99).[30]

[30] Testimony was given in the hearings with respect to the practice of clearing (R. 393, 448, 460, 487, 887, 897, 898, 916, 941, 965).

Various types of services are provided by "clearing" firms. One of the more common forms of clearance operations relates to financial transactions. In such instances the "clearing" firm collects sums due to the firm "cleared" from the buyer, and remits to the livestock producer the sums owing to him by the firm "cleared" (R. 375, 487, 1005). In such cases the bond of the "clearing" firm usually covers the financial obligations of the firm "cleared" (R. 375, 445, 448, 460). Other services which are performed by "clearing" firms include the performance of all of the office work of the firm "cleared", such as the bookkeeping, billing, and the preparation of account sales (R. 375, 393, 448, 916). Various "clearing" firms also buy and sell livestock (R. 445, 448, 894, 916, 941, 965, 1004), provide yarding service (R. 393, 448), and advertise (R. 448) for the firms cleared.

The charges made by "clearing" firms for their services range from 5 percent (R. 460) to 50 percent (R. 445, 966) of the commissions earned by the firm "cleared." Such charges frequently reach 25 percent (R. 375), 35 percent (R. 916, 1005), and 40 percent of (R. 445) the commissions earned by the firm for which the service is rendered. Such payments are made by the firms "cleared" only because they are unable to earn sufficient income to provide those services for themselves (R. 1004). Thus, Mr. Mullen, who operates the Mullen Commission Company (R. 802), stated that he was compelled to "clear" through Gillogly & Company because his

receipts are insufficient in volume to enable him to maintain an office of his own (R. 802, 813). It is his ambition to regain enough volume to enable him to again do business on his own account; he estimated that he would require receipts of 150 carloads of livestock per month in order to re-establish his own firm (R. 813).

It must be obvious that the firms which are "cleared" in this manner cannot properly be considered in determining reasonable salesmanship performance and reasonable salesmanship costs. A successful commission business cannot be conducted on receipts of 50 cars per year (R. 930). No firm which receives a volume of business insufficient to enable it to maintain its own office service, or to do its own yarding or selling, and which must therefore pay out 50% of its commissions for such services, can be said to be the reasonably efficient firm which is protected by law in its right to earn a profit.[31] A rate schedule raised to a level sufficiently high to enable all of these "cleared" firms to operate profitably would be manifestly unfair to the livestock producer who must pay those rates, and would serve only to induce the entrance of numerous other small-volume market agencies into the market. The result would be to divide the volume of receipts among an even greater number of market agencies; the inefficient firms would be un-

[31] It is significant that the firms which perform the "clearing" services apparently find it profitable to do so at half of the usual commission rate.

able to operate successfully, even under the increased rates, and a further rate increase would be necessary. This demonstrates the wisdom of the principle upon which the established method of rate determination is based—the promulgation of a rate structure which will produce sufficient revenue to enable every firm of reasonable efficiency to earn its reasonable costs of operation and in addition a reasonable compensation for the services which it renders to the livestock producer.

The Secretary's determination of a reasonable salesmanship performance was not based solely upon the actual experience of those market agencies which are in a position to operate in an efficient manner. In addition to this evidence, the Secretary had before him the testimony of a number of witnesses as to the number of animals which salesmen had been known to sell, and the number which a salesman might be expected to sell if he were furnished with a sufficient volume of business to utilize his services in a reasonably efficient manner.[32] The testimony with respect to what a salesman should reasonably be expected to do is admittedly opinion testimony. It was extracted from witnesses, most of whom were hostile, and some of whom were, in effect, warned on the witness stand, by objections made by appellants' counsel, that the testimony might be used to reduce the rates which they or their employers would be permitted to

[32] Some of this testimony is summarized on pp. 65–71, *infra*.

charge.[33] Under these circumstances, it is not surprising that in many cases diametrically opposed conclusions may be drawn from the testimony of a single witness.[34]

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[33] In paragraph 122 of his findings, the Secretary commented on the failure of members of the respondent firms to be frank in their expressions of opinions on this point and as to the extent to which their attitude was influenced by the character of the objections made by counsel (R. 142). Appellants stated in their brief on page 42 that the Secretary's comments were "a flagrant misstatement as regards the conduct of counsel or the attitude of witnesses." It is submitted that an unbiased examination of the record will disclose that the Secretary's comments were justified. (See particularly R. 362; R. 380; R. 585–586; R. 661–668; R. 672–684; R. 380). For example, on page 362 of record, appellants' counsel in making objection stated that witnesses, in hearings with respect to other stockyards, probably testified as to the volume of sales which could be made by a salesman "without recognition of the fact that it is of such grave importance to the welfare of themselves and to their children * * * and in answering the question they did not expect that the answer would be used in the way it was used."

Appellees call this Court's attention to these objections not for the purpose of suggesting that the conduct of appellants' counsel was in any way improper, but to indicate that the opinion testimony was, in most cases, taken from hostile witnesses and to show why, in many cases, witnesses made statements in one part of their testimony which they appear to contradict in other parts.

[34] Appellants, in their brief (pp. 26–36), make an attack upon much of the testimony referred to by the Secretary in his findings as to salesmanship performance. This attack consists of pointing out that some of the witnesses to whose testimony the Secretary referred in his findings, made other statements which tend to show that it is impossible to estimate how many head of cattle a salesman could sell in a year if he had sufficient volume to utilize his services in an efficient manner.

Despite this fact and the obvious reluctance of many of the witnesses to express opinions as to reasonable salesmanship, appellants submit that a reading of the testimony taken at the hearings shows that the Secretary's findings as to a reasonable salesmanship performance for each species of animal is fully supported by the evidence.

Cattle and calves.—The Secretary associated an annual salary of $4,500 with the sale of approximately 27,000 head of cattle and calves. In support of the selection of this figure there was ample testimony given at the hearings that throughout the year a salesman might be expected to sell an average of five carlots a day. As there are approximately 200 market days in a year, this daily average would produce the yearly performance figure used by the Secretary.

Mr. Mollin, Secretary of the American National Livestock Association, in response to a question as to how many carloads of cattle a salesman of ordinary efficiency should sell in the course of a year (R. 314) said:

> Well, I never yet saw a cattle salesman that placed any number limit on the number of cars that he could sell if he had them to sell. I would, in answering the question, base my answer on a 200 selling-day year, which would be practically four days a week, and I think that any salesman would say that he could sell at least 10 cars of cattle on any day, if he could get them to sell, and that would be a minimum of 2,000 cars a year applied to cattle.

Moreover, he stated (R. 317):

> I have seen them sell so many more than that number of animals, on occasion, without apparently straining his ability, that I think I have been very reasonable in stating it at 10 cars a day * * * I am testifying from my experience as to what I think they can do. I think that any of them can sell 10 cars a day, that is if they can get them, that is my testimony.

Harold Summers testified that John Clay & Co., for which he sold cattle, had on the previous day received 18 or 19 loads of butcher stuff which averaged about 30 head to the load. Although the market was slow (R. 625), two salesmen sold that quantity of cattle during that day and only 40 head of cattle were held over for the next day (R. 624).

Mr. Patterson, a small operator who had only one salesman besides himself, stated (R. 376, 378):

> If, on the following Monday morning, I were to receive 10 loads of cattle, I would go out and sell them and not take on any extra help.

Mr. Brotzman, president of the firm of Miller, White and Woods, asserted that on a good market a steer salesman could sell 5 carloads a day (R. 849, 858). He had seen salesmen sell many more than that number in a day, even as recently as the summer in which he testified, and although he was unable to give the exact number of carloads sold, he believed that the approximate number would be 10 (R. 858–859). He also testified that his salesmen were as good as any of the other salesmen in

the yards (R. 861) and that his firm could have sold a larger volume of cattle in 1932 (R. 861).

Mr. Woods, one of the partners in the firm of Swanson, Gilmore & Castenholz, testified that on the preceding day his firm had received 17 loads of cattle which were sold by three salesmen (R. 933).

Mr. Greene, head cattle salesman for Rice Brothers (R. 996, 1001), testified that on the preceding Monday his firm had received 18 straight carloads of steers and that he had personally sold 10 of those carloads (R. 1001). In the case of all but two of those carloads, sorting was required. In addition, the witness on the same day sold about 90 head of cattle which arrived by truck (R. 1002).

Mr. Vaughan, president of McCausland, Hoag & Vaughan, stated that in 1932 the average of the four cattle salesmen of that firm was 709 cars per salesman, and that the bulk of the sales were made by the witness himself (R. 907). C. O. Robinson, of Charles O. Robinson Co., testified that in 1932 "with any kind of an ordinary market, I could have handled 25 cars at least" a day, but as to whether he could sell that many carlots day in and day out would depend on conditions.[34a] (R. 479-481.)

It is clear from the testimony that the low salesmanship performance of a number of firms oper-

[34a] It is the testimony of this witness which was referred to in the Secretary's findings and which appellants say on page 27 of their brief they cannot find in the record.

ating on the Chicago market is caused by the insufficient volume of their business (R. 373–374, 376, 479–481, 581, 585, 742, 751, 860, 878.)

Sheep.—The Secretary associated the sale of 270,000 head of sheep and above with a salary of $4,000 and above. On an average, there are 226 head of sheep in each carlot sold (Resp. Ex. 12, Sched. 13–14). F. R. Marshall, secretary of the National Wool Growers' Association (R. 384), stated that he had known salesmen to sell from four to six cars of sheep per day and that on one occasion, 15 or 16 cars of sheep were sold in a day by John Clay & Company and a similar number by W. R. Smith & Company (R. 390–391), even though at the time in question the market was slow (R. 392). John Swanson, sheep salesman for John Clay & Company, asserted that he has ordered the delivery of possibly 20 carlots of sheep in one day from the feedlots with the expectation of selling them, although he has frequently been assisted by another salesman (R. 408). The calculations of appellants' own account shows that John Clay & Co. in 1932 had an average performance per salesman of 1,111 carlots of sheep (Resp. Ex. 12, Sched. 24C). James L. Merrion, of Merrion & Wilkins, stated that in October of 1932 he had sold 15 cars of sheep in about eight hours (R. 417), although there were

some days when it would not be possible to sell that many. The figures of appellants' accountant indicate that the salesmen of this firm in 1932 sold an average of 1,087 carlots of sheep (Resp. Ex. 12, Sched. 24C).

The salesmanship performance which may reasonably be expected of a salesman whose services are utilized in an efficient manner is shown by the facts in the record with respect to W. A. Burns. The record shows that Burns and one assistant in 1932 sold 546 cars of sheep for Alexander Conover & Co. (Resp. Ex. 12, Sched. 24C). Although it is not absolutely clear from the record, it may be inferred that Burns sold by far the greater part of those sheep (R. 959). In the same year, 1932, Burns sold all of the 449 cars of sheep handled by 7 other commission firms which employed him as a sheep salesman (Resp. Ex. 12, Sched. 24C).

Hogs.—The Secretary associated the sale of 87,000 head of hogs and above with a salary of $3,600 and above. The average number of hogs in each carlot sold is 88. (Resp. Ex. 12, Sched. 13–14). The salesmanship performance which can reasonably be expected of a salesman when he has a sufficient volume of business to utilize his services in an efficient manner is plainly demonstrated by the experience of two cooperative market agencies operating at the Chicago Stock Yards. In 1932 the Farmers' Union Livestock Commission had a sales performance for hogs of 124,878 head per salesman (Gov. Ex. 49, p. 186; Gov. Ex. 15–99,

Sched. 2). In the same year, the Chicago Producers Commission Association had a salesmanship performance for hogs of 101,653 head per salesman (Gov. Ex. 49, p. 186; Gov. Ex. 15–100; Sched. 2).

Levi Spencer, the owner of L. Spencer & Company (R. 486), stated that he could sell five or six cars of hogs a day provided the market was right (R. 491). He did not care to handle personally more than eight or ten carloads of hogs in a day, but he could handle that amount properly (R. 499). He also testified that in 1932 and 1933 he could have handled a greater volume of hogs than he did handle. Mr. McClelland, a member of the firm of H. D. Copeland & Company, testified that in 1923 he had sold more than 2,900 cars of hogs and that he is as able a salesman now as he was at that time but that at present he does not receive that volume of business (R. 799). He also testified that although in 1923 he had sold more than 2,900 cars of hogs, his firm does not at the present time receive a thousand cars to be sold by its two salesmen. He believes that he is at present quite as good a salesman as he was in 1923 (R. 799). Paul A. Filler, of Filler, Wilson & McClelland, was of the opinion that a greater volume could have been handled by his firm with his present force (R. 1007). W. H. Brott estimated that he could handle approximately 20 percent more business with his present organization if the receipts were forthcoming (R. 1008).

Mr. Conover, president of Alexander Conover & Company (R. 951), testified that if he were assured of an extra hundred carloads of receipts for the given year he would not engage another salesman (R. 961). Similarly, Mr. Mallory, an employee of Wm. Gentlemen & Son, declined to estimate the number of hogs he could sell on an ordinary day but stated that he could sell as many hogs as any other salesman on the Chicago market under the same conditions (R. 443).

2. APPELLANTS' ATTACK ON THE SALARY FIGURES USED BY THE SECRETARY TO DETERMINE REASONABLE COSTS IS BASED ON COSTS IMPROPERLY PADDED BY THE INCLUSION OF EXCESSIVE APPRAISED VALUES FOR THE SERVICES OF OWNERS OF MARKET AGENCIES

Although appellants refer to testimony that it is improper to measure the value of a salesman by the number of animals he can sell (appellants' brief, p. 47), it seems clear that no valid objection can be made to the Secretary's action in associating a certain salary figure with a certain salesmanship performance for the purpose of determining unit costs.[35] It is clear from the record that there is a direct and substantial relation between the volume of business handled or controlled by a salesman and

[35] It is improper to regard the Secretary as having measured the value of any salesman by his association of a salary figure with a salesmanship performance. In making that association the Secretary was merely determining a relationship for the purpose of ascertaining reasonable unit costs, and was not attempting to fix salaries or to make a requirement as to the number of animals which a salesman must sell, or to make any determination as to the "worth" or value of the salesman.

his salary. The audit of the commission firms disclosed that the compensation of approximately 25% of the salesmen employed in 1932 was based wholly or in part on a percentage of the commission received from the business controlled by them (par. 120, Secretary's findings; R. 140). There is ample testimony in the record with respect to this relationship between volume and salary (R. 464, 669, 793, 854).[36] For example, there was testimony that salesmen of equal ability receive different salaries, depending upon the volume of business which they handle (R. 1009).

Appellants' most strenuous objections, however, are not against the action of the Secretary in associating a certain salary figure with a designated sales performance but rather against the salary and performance figures which the Secretary used. In so far as those objections relate to the performance figures used by the Secretary, they have been answered on pages 63–71, *supra*.

The reasonableness of the salary figures selected by the Secretary for use in determining reasonable unit costs is clearly demonstrated by the following table which shows the number of salesmen

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[36] William G. McClelland, of H. D. Copeland & Company, testified as follows (R. 801):

> I would say that the bigger the volume the salesman handles, the bigger the salary the firm could afford to pay him. I don't think that a good salesman could afford to work for a salary that a firm could afford to pay that salesman on fifty cars of business, but some men have to work for less than they can afford to and they cannot help themselves.

for each species falling in the different salary brackets (Gov. Ex. 49, pp. 283–285):

Cattle salesmen

(Salary figure selected by the Secretary, $4,500)

No. receiving—	1932
$6,000 or more [1]	15
5,000 to 6,000	10
4,000 to 5,000	14
3,000 to 4,000	29
2,000 to 3,000	32
Less than 2,000	15
Total	115

[1] Firm 77 had two men who worked only two months each during the year. The amount of money paid to each would, as shown in Gov. Exhibit 15–77, on a yearly basis place them among the number receiving $6,000 or more. These men are not included in the above table.

Hog salesmen

(Salary figure selected by the Secretary, $3,600)

No. receiving—	1932
$6,000 or more	0
5,000 to 6,000	6
4,000 to 5,000	12
3,000 to 4,000	17
2,000 to 3,000	18
Less than 2,000	8
Total	61

Sheep salesmen

(Salary figure selected by the Secretary, $4,000)

No. receiving—	1932
$6,000 or more	2
5,000 to 6,000	2
4,000 to 5,000	1
3,000 to 4,000	3
2,000 to 3,000	7
Less than 2,000	1
Total	16

In attacking the salary figures used by the Secretary, appellants make frequent use of figures which they claim represent the average salaries *paid* to salesmen and the average unit costs actually incurred for salesmanship by the market agencies operating at the Chicago stockyards. These average salary and salesmanship cost figures have been improperly padded by the inclusion of excessive appraised values for the services of owners of market agencies.

These appraisals were made by a committee of five, appointed by appellants (R. 1012). In each case they represent the amount which the committee believed the owner could earn if he were to seek employment with some other firm (R. 1022). The committee did not differentiate salaries on the basis of the volume of business handled by the owner (R. 1016, 1023, 1024). It did not consider whether the business was increasing or declining (R. 1019), or was conducted at a loss (R. 1019–1020). These appraised values bear absolutely no relation to the compensation actually received by the owners from their firms. The following table, based upon data contained in Appellants' Exhibit 12, Schedule 11, shows the great discrepancy which exists between the compensation actually received and these appraised values:

Firm No.	Owner	Actual Compensation Received	Appraised Value	Increase
20	Monti Cenklin	$7,999.92	$15,000.00	$7,000.08
48	E. H. Keunster	7,175.83	18,000.00	10,824.00
56	E. L. Vaughan	9,999.96	18,000.00	8,000.04
59	G. P. Hixon	2,639.15	5,000.00	2,360.85
66	E. G. Fulkerson	12,000.00	25,000.00	13,000.00
70	W. H. Palmer	5,140.00	12,000.00	6,860.00
77	Chas. Rice	12,000.00	25,000.00	13,000.00
81	A. Wertheimer	4,100.00	12,000.00	7,900.00
11	C. J. Castenholz	9,600.00	15,000.00	5,400.00
45	Chas. A. Dunbar	10,080.00	22,000.00	12,000.00
54	W. G. Norris	6,017.45	15,000.00	8,982.55
83	W. A. Roberts	3,853.00	10,000.00	6,147.00
83	T. T. Sinnard	3,853.00	10,000.00	6,147.00

It should be observed that in the majority of the instances shown in the above table the appraised value is more than double the actual compensation received. As to all of appellants, the inclusion in costs of the excessive and hypothetical appraisals of the value of the services of owners would pad costs by $353,607.82 in excess of the amounts actually realized by the owners in salaries and profits (Resp. Ex. 12, Sched. 11).

It is these excessive and hypothetical values which appellants have included in the computations which are the basis for their attack on the salary figures used by the Secretary in determining reasonable unit costs. For example, in a table on page 40 of appellants' brief they state that the average salary (1932) for cattle and calf salesmen is $5,608.08, *whereas in fact it was only $3,839* (Gov. Ex. 49, pp. 283–285). The alleged average of $5,608.08 reflects these excessive appraised values. (Respondents' Exhibit 12, Schedule 24–A). Salary figures, similarly inflated, are used in other

sections of appellants' brief.[37] In fact, 75 percent of the cattle salesmen who were employed in arm's length bargaining received in 1932 an annual salary of less than $4,500. The median annual salary for employed cattle salesmen in that year was only $3,204 (Gov. Ex. 49, pp. 283–285). In the case of the other species, similar discrepancies exist between the average annual salaries actually paid to employed salesmen and the average salaries claimed by appellants on the basis of these hypothetical and inflated appraised salaries for owners.

This use of these appraisals naturally leads to absurd results. Under the old rate schedule the maximum rates which may be collected for cattle and calves range from $21.00 to $24.00 per car on single deck consignments (R. 57–62). But according to Respondents' Exhibit 12, Schedule 24–A, at least eleven firms spent more for salesmen's salaries per car for cattle and calves than the total commissions to which they are entitled under that rate schedule. This is demonstrated by the following table, which is based upon that Exhibit:

[37] The extent to which these appraisals affect the figures used by appellants is strikingly demonstrated in the discussion of the salesmanship performance of the firms of John Clay & Company, Merrion & Wilkins, and W. R. Smith & Sons, on page 61 of their brief. Appellants state that six salesmen employed by these firms did more than one-half of the business of the market in sheep in 1932 and received an average salary of $6,666.66. The figure of $6,666.66 is obtained by including the value of the services of two owners (J. S. Merrion, of Merrion & Wilkins, and J. C. Eastes, of W. R. Smith & Sons). The salaries paid the employed salesmen average only $3,874.75. (Resp. Ex. 12, Schedule 24–C.)

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Name of Firm	Number of Cars Sold, 1932	Amount Claimed For Salaries	Average Salary Per Car
C. H. Acker & Co	22	$2,000.00	$90.91
Central Livestock Com. Co	977	23,943.01	24.50
William Daniel	90	2,500.00	27.77
Fred Freeman	40	1,200.00	30.00
I. O. Fry	68	1,800.00	26.47
Gillogly & Co	1,012	23,696.00	23.41
Geo. F. Hogan & Co	11	1,200.00	109.09
Nalley Com. Co	628	18,043.33	28.73
Schroeder Com. Co			
Pritchard Com. Co	178	8,034.99	45.14
Strader Bros	42	1,200.00	28.57
Swiney Bros	673	20,544.00	30.52

Most of the other firms claimed salaries so great as to cause the average salary per car to range from $10.00 to $20.00. (Respondents' Ex. 12, Schedule 24–A.)

A number of illustrations may be given to show the extent to which alleged costs of salesmanship have been increased by inclusion of these appraised values. The Central Live Stock Commission Co. handled 977 cars of cattle and calves in 1932. Its three employed salesmen received salaries aggregating $11,943.01. The services of one owner were appraised at $12,000, bringing the total salesmanship cost of this firm to $23,943.01. The inclusion of this excessive allowance, which was not in fact paid, caused the average salary of salesmen per car for this firm to appear to be $24.50—more than the per car commissions under the old rate schedule. (Respondents' Ex. 12, Schedules 11 and 24–A.) Another comparison showing the fallacy of the salary appraisal method employed by the

appellants may be made between John Clay & Company and the National Live Stock Commission Company. In 1932 John Clay & Company handled 5,694 cars of cattle and calves while the National Live Stock Commission Company handled 5,214 cars of the same species. Each of these firms, according to the appellants' accountant, had five cattle and calf salesmen, and the average number of cars per individual for both firms was high. The average performance per man for John Clay & Company was 1,139 cars and for the National Live Stock Commission Company was 1,043 cars. The National Live Stock Commission Company has one owner who is a cattle salesman, and the appellants assert that his services should be appraised at $25,000 (Respondents' Ex. 12, Schedules 11 and 24–A). As a result the salaries shown for the National Live Stock Commission Company are almost twice those shown for John Clay & Company, although the per man performance of the National Live Stock Commission Company is almost 100 cars less than that of John Clay & Company. The appellants' audit shows that John Clay & Company actually spent $27,144.98 for salaries for classified cattle and calf salesmen, while the National Live Stock Commission Company claims $52,750 for cattle and calf salesmen. The result of this cost padding in the case of the National Live Stock Commission Company is to make that Company's average salary per car appear to be more

than twice that for John Clay & Company. *John Clay & Company which does not attempt to include these appraisals in the salesmanship costs shows in 1932 an average salary per car of $4.59 (Respondents' Exhibit 12, Schedule 24–A)*, which *is less than that which the Secretary has determined to be reasonable.*[38]

A similar instance of cost padding is found in the case of the Kuenster Live Stock Commission Company. That firm handled 1,833 cars of hogs and had an average performance of 367 cars per man for all of its salesmen (Respondents' Ex. 12, Schedule 24B). The owner of the firm, Mr. Kuenster, served as a hog salesman, and his services were appraised at $18,000, although he actually received only a salary of $1,400 and a profit of $5,775.83, making a total of $7,175.83 (Respondents' Ex. 12, Schedule 11). The appraisal allowed Mr. Kuenster more than $10,000 in excess of the sum which he actually received. The same situation exists with reference to practically all of the firms whose owners' services were appraised.

It is clear that the Secretary properly ignored these excessive appraisals of the value of the services of owners in determining reasonable salesman-

[38] The Secretary allowed $.1667 per head for cattle and calf salesmanship costs (R. 150) and found that on the average a car contains 29 head (R. 146–147). Thus, $.1667 × 29 = $4.83 per car.

ship costs and looked instead to the salaries actually paid to salesmen who were employed by market agencies in arm's length bargaining. None of the firms on the market could afford to pay its owners the amounts claimed to be the fair value of their services and those amounts bear no relation to the real value of such services. Appellants have no right to include such hypothetical and imaginary expenditures in any cost analysis upon which a rate structure is to be based.

B. *The Secretary's Findings as to Reasonable Costs for Getting and Maintaining Business are Fully Supported By the Evidence*

After a study of the expenses incurred by the market agencies for the purpose of getting and maintaining business, the Secretary found that a reasonable unit cost for that purpose should not exceed nine percent of the total reasonable cost found (par. 145, Secretary's findings; R. 166–167). This determination relates only to non-salary expenditures and does not affect in any way the time which may be used by a salesman for soliciting. On a per head basis, the allowance amounts to $.0350 for cattle and calves; $.0125 for hogs; and $.0050 for sheep (R. 180). On a per car basis, the allowance amounts to $1.06 per car for cattle and calves; $.98 for hogs; and $1.00 for sheep (par. 130, R. 146–147).

This determination of reasonable unit cost is not a restriction on the amount that can be spent for the purpose of getting and maintaining business. A market agency may spend more if it takes the funds from savings effected on other functions, or from the excess over and above reasonable costs and profits which the Secretary's rates will admittedly produce. Appellants are free to make expenditures which are self-liquidating because of the increased business they produce.

The methods employed by appellants in getting and maintaining business are summarized in paragraphs 81 to 86 of the Secretary's findings (R. 119–121).[39] Practically all of the commission firms send salesmen into the country to visit shippers and to solicit business (R. 356, 422, 443, 446, 463, 490, 511, 587). During such trips it is customary for the salesmen to sort and grade cattle and to make appraisals for the shipper (R. 401, 463, 490). Information is given to the shipper concerning the feeding of cattle and market conditions (R. 810, 888, 913–914, 987). Occasionally, long trips requiring thirty days or more are taken to visit western shippers (R. 400, 422, 511, 792).

[39] The Union Stock Yard & Transit Company, on behalf of the market as a whole, advertises in newspapers to secure shipments to Chicago stockyards and also advertises over the radio for the same purpose. It sends representatives into the country to visit shippers, and conducts the International Live Stock Exposition as a means of drawing business to the Chicago stockyards (R. 302).

A certain amount of solicitation is carried on by personal letters (R. 444, 470, 659, 718, 892). Circular market letters are sent to customers living in the territory from which the firms draw their business to inform them of current market conditions (R. 396, 476, 618, 718, 812, 891). Some firms endeavor to send circulars only in the periods in which the shippers have livestock ready for market (R. 964). The information contained in these market letters is secured from the salesmen and buyers, from the United States Bureau of Agricultural Economics, the Drovers' Journal, and the Research Department of the National Live Stock Marketing Association (R. 599–600). Commission firms advertise in trade papers (R. 396, 617–618, 1007). At least one market agency publishes its own monthly organ which is sent to shippers (R. 659). Shippers are frequently provided with free subscriptions to market papers such as the Chicago Daily Drovers' Journal (R. 396, 426, 891, 892, 898, 910). Another form of advertising employed is the distribution of specialties such as pencils and notebooks (R. 490, 592, 891–892), and such items as marking shears, sheep markers and canes (R. 600). Occasionally shippers are entertained by salesmen (R. 553, 592–593).

Some firms have adopted the practice of making loans to shippers in order to obtain their patronage (R. 408, 659, 720, 992). It is generally understood that shippers will send live stock to the commission firm which has made a loan on them (R.

660). At least one firm maintains a transportation and claim department which collects railroad claims for shippers without direct charge to the shipper (R. 601). The same firm makes radio broadcasts during the week days (R. 600).

In Paragraph 142 of his Findings, the Secretary recognized that some expenditure for the purpose of getting and maintaining business was necessary and proper. He said (R. 162):

> Respondents are entitled to use such means and methods as will enable them to keep their names before the public. It is recognized that the reputation for rendering good service is one of the most important factors in holding and getting business but respondents do not deem that alone to be sufficient. Personal contacts with their customers and prospective customers is regarded as an important element in the maintenance of the business. Respondent members of the Chicago Live Stock Exchange have mutually imposed some limitations upon themselves as to the amount of time and the expense devoted to business getting efforts. Each respondent holds its services out to be of the very highest character. Beyond the payment of a reasonable amount in the form of rates to enable the respondents to keep their names before the public, the shipper should not be required to pay to have himself persuaded to patronize one commission firm rather than another, when each serves him equally well.

The Secretary's analysis of the expenditures for getting and maintaining business made by the various firms showed that the actual non-salary expenditures for business getting and maintaining varied among the different firms from nothing to approximately 27 percent of the gross commissions (Gov. Ex. 49, pp. 103–105). All firms spent an average of approximately 11 percent of their total commissions on non-salary expenses for business getting and maintaining (Gov. Ex. 49, p. 105). A great many firms actually spent less than the amounts allowed by the order of the Secretary. The government's cost study (Gov. Ex. 49, pp. 22–24), showed at least twenty-one firms which had smaller per head business getting and maintaining costs for cattle and calves than were found to be reasonable by the Secretary.[40] At least fifteen firms had lower expenditures per head for this pur-

[40] Appellants emphasize the fact that the Chicago Producers' Commission Association, a firm owned and managed by shippers and producers of livestock, spends more for the purpose of getting and maintaining business than the amount found by the Secretary to be reasonable. Appellees submit that the experience of the Chicago Producers' Commission Association has no special relevancy. There is nothing in the record to show that in this respect the business of the association is conducted on a reasonable and efficient basis. Certainly the mere fact that it is owned and managed by shippers and producers is no basis for assuming this to be the case. Presumably, such an association is subject to competitive pressure similar to that which drives ordinary market agencies to spend excessive amounts for business getting and maintenance.

pose for hogs than that found to be reasonable by the Secretary (Gov. Ex. 49, pp. 31–33); and at least six firms had lower expenditures than that allowed by the Secretary for sheep (Gov. Ex. 49, pp. 31–33). In addition, there were sixteen firms whose books did not show any non-salary expenses whatever for business getting and maintaining.

A few firms made very large expenditures for the purpose of getting and maintaining business. This is illustrated by the following table, which compares non-salary expense for business getting and maintenance with gross income from commissions (Gov. Ex. 49, pp. 22–24, 31–33, 40–42).

Firm No.	Non-Salary Expense for Business Getting and Maintenance	Gross Income From Commissions[1] (Less Seconds)	Percent of Expense to Gross Income
49	$334.18	$1,209.75	27.61
91	1,854.18	6,827.93	27.15
12	2,310.62	8,640.58	26.74
36	2,074.11	8,215.29	25.25
13	1,734.02	5,650.13	30.04
6	8,047.74	40,245.43	20
67	909.09	5,088.85	19.63
26	3,979.51	22,297.23	17.85
71	13,028.14	74,321.68	17.53
23	6,883.57	41,887.29	16.43

[1] "Seconds" are animals purchased at the stockyards by traders and placed with commission firms to be resold without moving them from the stockyards (R. 92-93). The acquisition of this class of business does not require business getting effort. Therefore, in the figure given above with respect to gross income, the commission received on sale of seconds has been eliminated.

The expenditures of some market agencies for the non-salary expense of business getting and maintenance ranged from $3 to $5 per carload of livestock. It is obvious that the expenditure of such amounts

is unreasonable and excessive. Even under the old rate schedule such expenditures would run from ten to twenty-five percent of the amount of the commissions. In the fac of the evidence, appellants' statement on page 66 of their brief that there is "no evidence in the record of waste or extravagance, in business getting and maintenance expenses" is obviously without foundation."[41]

In addition to this statistical evidence, there is testimony in the record which indicates that excessive and unnecessary costs are incurred for the purpose of getting and maintaining business. These expenditures are largely the result of the competitive conditions existing at the Chicago stockyards. The owner of one market agency stated that he is practically forced to spend a greater percentage of his gross commission in soliciting country business than he properly can afford to spend (R. 486, 497). The president of an-

[41] Appellants attach some significance to the statement made by Mr. Bachman, one of the government accountants, that in analyzing the amounts spent for business getting and maintenance he made no investigation to determine whether the amounts spent were proper (appellants' brief, p. 74). It was not Mr. Bachman's function to determine the propriety of the costs incurred by appellants. His investigation was made for the purpose of determining what costs were actually incurred. His statement was accurate but it does not indicate, as appellants seem to believe, that no investigation or determination was made as to the propriety of the amounts spent. That determination was made by the Secretary.

other market agency testified that for his own protection he was compelled in 1933 to hire a man to solicit in the country because he found that other firms were doing so (R. 910). A member of another firm admitted that some market agencies spend more for traveling expenses than they should (R. 710, 720). The president of another firm testified that he had investigated the additional business which had been secured by trips to the country and he had found that the trips required the expenditure of too much money (R. 924), and that they had not proved profitable to his firm (R. 928). Significant testimony was also presented to the effect that a number of firms have endeavored in recent years to reduce their expenditures for business getting and maintaining (R. 446, 738, 748, 910, 963–964) and that these reductions in expenditures have not been accompanied by any noticeable decrease in the volume of business (R. 446). There was also testimony that solicitors from Chicago firms visited distant areas which could be served by other markets (R. 312–313).

It is clear that shippers should not be required to pay to be persuaded to patronize one market agency rather than another. This Court has held that the rate payer cannot be made to bear the cost of an intense competitive struggle between rival utilities. In *Public Service Commission of Montana* v. *Great Northern Utilities Company,* 289 U. S. 130,

a suit was brought attacking a rate order as unconstitutional. The utility in question had a competitor in the same town and the rate order attacked fixed the same maximum and minimum rates for both utilities. The plaintiff utility alleged that the order deprived it of its right to compete for the preservation of its business. The District Court held that although the field was insufficient to support two utilities the rate-making body could not interfere with the right of the plaintiff utility to fight to a finish by rate competition and that the order was therefore unreasonable and beyond the statutory authority of the rate-making body. 1 F. Supp. 328; 52 F. (2d) 802. In reversing the decree of the District Court, this Court stated (pp. 134–135):

> The demand for gas in the community served is not sufficient to require both systems, and there is no suggestion that it is likely to become great enough to justify the expenditures made for them. The facts disclosed by the record compel the conclusion that, if competition shall continue in the future as in the past, appellee will not be able upon the rates within constitutional protection against reduction to earn a reasonable return upon the value of its property employed in the public service. The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use,

> for the service of the public without just compensation.[42]
>
> * * * * *
>
> But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used. The loss of, or the failure to obtain, patronage, due to competition, does not justify the imposition of charges that are exorbitant and unjust to the public. The clause of the Constitution here invoked does not protect public utilities against such business hazards.

In objecting to the allowance made by the Secretary for business getting and maintenance, appellants insist that "the function of business getting and maintenance is not only to secure and retain business but to serve the shipper of live stock" (appellants' brief, p. 67). The best answer to this contention is furnished by the testimony of two representatives of associations of shippers. Mr. Mollin, secretary of the American National Live Stock Association (R. 308), stated with reference to the matter of advertising, soliciting, and business getting activities (R. 312):

> I think that the greatest saving that you will be able to make will come in that item. I have always taken the position that a reasonable amount should be allowed for that

[42] Compare *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447.

> general combined purpose for advertising which it all boils down to in the end. Some of our people, some stock men do not go that far and say there should not be any allowance made. I have been willing that there should be a reasonable allowance, that the Secretary should determine from examination of all of the facts in the matter, and when the allowance has been made, I think it is immaterial to the live stock industry how the commission man spends it.

Mr. Mollin expressed the opinion that most live stock producers are willing to forego solicitation when it is expanded to the point where it is used as a base in making an unreasonable commission rate (R. 312). In describing the invasion by Chicago solicitors of the territory near the Denver market, Mr. Mollin used the following vivid language (R. 313):

> When there are many lambs coming to this market from northern Colorado and western Nebraska and those concentrated feeding areas, they actually have to shoo solicitors out of the chutes to load the sheep before they can get them loaded, there is such competition, sometimes six or eight people from one place trying to get the business, and that is not doing the industry a bit of good.

Another representative of shippers, Mr. Marshall, Secretary of the National Wool Growers' Association (R. 384), asserted that the volume of business diverted from one market agency to

another can not directly or indirectly be considered as enabling the commission men to give more efficient service or to give cheaper service (R. 388). He was of the opinion that no allowance whatever should be made in the commission rate for the expense of getting and maintaining business, and he expressed the opinion that his view represented the attitude of the individual members of his association (R. 393).[43]

It is clear from the record that the primary motive of the expenditures for business getting and maintenance is to gain a competitive advantage and not to serve the shippers. Thus it appears that trips made by salesmen into the country are made primarily to get business (R. 888–889, 969, 988, 463, 896, 512, 624, 659, 830, 854, 1011–1012, 987).

Mr. Henkle, vice-president and general manager of the Union Stock-Yard & Transit Company (R. 302), stated that the object and purpose of all of the advertising and soliciting activities of the market agencies is to draw the business to the particular commission firm (R. 305). In soliciting business in the country the salesmen recommend their own firms to the farmer (R. 971). On trips to the

[43] In appellants' brief they attack the testimony of Messrs. Mollin and Marshall as biased (appellants' brief, p. 67). This attack is apparently based on the fact that these witnesses were representatives of associations of shippers, a circumstance which gives their testimony peculiar weight in so far as it relates to appellants' contention that expenditures for business getting and maintenance should be regarded as made in the shippers' interest.

country the salesman of one firm is likely to encounter those of other firms (R. 593, 830). The salesmen endeavor to draw business from other firms operating on the same market (R. 408, 495). Mr. Kuenster, the owner of the Kuenster Live Stock Commission Company (R. 459), stated with reference to his soliciting (R. 474):

> If successful, it merely takes receipts away from some other commission firm and adds to my own.

To a great extent the competing market agencies operating on the Chicago stockyards solicit business from the same shippers (R. 624, 753, 740, 804, 984). A salesman will frequently solicit the patronage of a shipper who is known to have patronized another firm consistently in the past and whose cattle have been appraised by the salesman of another firm (R. 721–722, 1008). Mr. Benton, owner of Benton & Company (R. 1004), stated (R. 1005):

> I naturally solicit producers and farmers who have been sending their live stock to other firms on the Chicago market.

Similarly, Mr. Bowles stated (R. 1012):

> We would have to solicit the business of farmers and producers who ship to other commission firms on the Chicago market because everybody ships to somebody; they take mine away from me and vice versa, that is, they get them, and, when they pay our commission, they do not owe us anything; they are free lances.

Other witnesses testified that they solicited shippers they knew had been solicited by other commission men (R. 813). Mr. Baker, a partner in the firm of Baker, Heyne & Company (R. 826), stated (R. 834):

> If I am informed or know that a shipper has been solicited by another firm on the Chicago yards I certainly solicit that firm. I don't know anything about what other commission firms do about soliciting my business. I have met solicitors representing other commission firms doing business on the Chicago yards.

In view of the competitive purpose of these activities, appellants' contention that they are carried on in the interest of the shipper is clearly without foundation.

The appellants object to the cost allowed by the Secretary for the expense of business getting and maintenance on the ground that it has no relationship to actual costs (appellants' brief, p. 73). It is obvious that the Secretary did not attempt to make an allowance for business getting and maintaining which would approximate the costs actually incurred by many of the market agencies. He was seeking to determine the reasonable unit cost of such activities and he had before him ample evidence to show that the unit costs incurred by many commission firms for the purpose of getting and maintaining business were excessive and extravagant. An allowance made on the basis of the average unit cost of these activities would have reflected

their unreasonable expenditures. The expenses actually incurred by many market agencies for the purpose of getting and maintaining business, are patently inadequate as guides to reasonable costs, because the competitive conditions existing at Chicago tend to force those expenses beyond all reasonable limits. The present expenditures of the Chicago market agencies for business getting and maintenance are governed solely by the amount of money at their disposal. Some firms attempt to limit the amount of money spent for those purposes (R. 538), but the greater number do not. In the case of many firms there appears to be no definite policy with respect to the expense incurred for soliciting, and they do not budget such expenditures (R. 428–429, 475, 511, 599, 720). Nor does it appear that the commission firms apportion their funds devoted to this function in any particular manner between business getting and business maintaining expenditures (R. 552, 512).

Appellants also contend that in making an allowance for business getting and maintaining the Secretary disregarded the fact that it is necessary for appellants to meet the competition of direct buyers and of other livestock markets. Appellees submit that the Secretary properly found that shippers should not be compelled to pay, in the form of rates, for having other shippers persuaded not to sell their livestock direct to packers or on other markets. There are substantial grounds for doubt-

ing whether extravagant expenditures are effective in meeting this competition. Mr. A. M. Gentleman, one of the partners of William Gentleman & Sons (R. 985), asserted that he believed that his firm had secured some shipments which had been drawn away from the packers but admitted that he had kept no record to determine whether in fact this was the case (R. 988). Mr. Swanson, a salesman for John Clay & Company (R. 397), asserted that he had not been successful in getting many shippers to discontinue direct buying and to ship to his firm (R. 409). Mr. Filler, President of Filler, Wilson & McClelland (R. 1005), asserted that he would like to spend more money for business getting and maintaining expenditures but asserted that under the present circumstances it is useless to try to go out and get business from the direct buyers (R. 1007).

The size and general reputation of the Chicago market are strong drawing factors throughout the country, and the market would obtain a considerable volume of business regardless of whether it or the market agencies advertise (R. 304). In fact, it appears that the prices which may be obtained, and not advertising, is the decisive factor in determining the market on which livestock is to be sold (R. 809).

Furthermore, it appears that satisfactory services to shippers is more important in maintaining business than are extravagant expenditures for ad-

vertising (R. 408). Mr. Dunbar, a partner in the firm of Walters & Dunbar (R. 508) stated (R. 522):

> The best solicitation we can get is to have a satisfied shipper in a territory that is shipping regularly to Walters & Dunbar and reporting that fact to his neighbors.

Generally when a firm secures a customer that customer stays with the firm. Mr. T. E. Swiney, one of the partners in Swiney Brothers (R. 728) stated that more than 75% of the new business of that firm is received through old customers (R. 754). This view is confirmed by the testimony of Mr. Murphy, a live stock producer (R. 802), who testified that despite solicitation by other firms he ships consistently to Rice Brothers at Chicago because he has secured good service from that firm (R. 804).

C. *The Secretary's Findings as to Reasonable Profits Are Fully Supported by the Evidence*

Provision is made in the Secretary's order for profit to be covered into the prescribed rates. Paragraph 154 of the order states (R. 178):

> In addition to producing reasonable per-head costs incident to the handling of the different species of livestock, reasonable rates should provide also a profit, that is, compensation for management and the carrying of uninsurable risks.[44]

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[44] In *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, the Secretary in fixing rates made a determination as to reasonable costs but no determination as to reasonable profits (*Tagg Bros. & Moorhead* v. *U. S.*, R. 23–42).

Accordingly, the Secretary made the following per head allowance to cover management and uninsurable risks (R. 180):

	Cattle and calves	Hogs	Sheep
Management	$0.0350	$0.0125	$0.0030
Uninsurable risks	.0040	.0015	.0005

In addition to this allowance for management and uninsurable risks, the Secretary provided for interest at the rate of 6% on fixed assets and 7% on working capital (paragraphs 148 to 153 of the Secretary's findings, R. 173–178). This allowance covers the capital required for such items as (1) furniture and fixtures, horses, yard supplies, and automobiles; (2) working capital; and (3) materials and supplies (R. 173). The amounts covered into the prescribed rates for this purpose (R. 180) were determined upon a study of the capital requirements of the various commission firms operating on the Chicago market (R. 175–177).[45] It should also be noted that by his determination of reasonable unit costs for such functions as selling, office work, and the work performed by yard men, the Secretary has made adequate allowance for work done by an owner in performing those functions.

[45] The per-head allowances were (R. 138):

Cattle and Calves	$.0080
Hogs	.0025
Sheep	.0010

Furthermore, in considering appellants' contention that the Secretary's finding as to profits is unreasonable, it should be remembered that appellants have admitted by stipulation that the rates prescribed by the Secretary, if applied to the aggregate business done by all appellants in 1932, would have produced revenue sufficient to cover the costs *and profits* found by the Secretary to be reasonable and, in addition a margin of $493,491 over and above those costs and profits.

Appellants apparently do not object to the amount of the allowances made for uninsurable risks and for management, but they contend that those allowances should be classified as costs and not as profits. They insist that an owner is entitled to a "pure profit", that is, an amount over and above all operating expenses, including uninsurable risks and compensation for management (appellants' brief, pp. 76–77).

The allowance made by the Secretary for management is in excess of the amount necessary to provide for the actual cost of management or management wages. This affirmatively appears from the evidence upon which the Secretary acted in making the allowance and to which he refers in paragraph 156 of his findings (R. 179). There are two cooperative market agencies at the Chicago stockyards, and they employ managers. The salaries of these managers are fixed in arm's length bargaining and may properly be accepted as stand-

ards for determining the proper amount to be allowed for the cost of management.

The per car cost incurred for management by one of the cooperatives in 1932 was $.74 (Gov. Ex. 49, pp. 75, 186). For the other it was $.60 (Gov. Ex. 49 pp. 75, 186). The allowance made by the Secretary for management amounts to approximately $1.01 per carload. There was additional evidence in the record tending to show the liberality of the allowance made by the Secretary. E. J. Lawler, the sole owner of Lawler Bros., testified that not more than 20 percent of the total income realized by him in 1932 should be allocated to his managerial duties (R. 878). He withdrew $28,222 from the business in that year (Gov. Ex. 15–51C). In that year his firm handled approximately 5,616 cars and carlot equivalents of all species (Resp. Ex. 12, Sched. 14). On that basis, his managerial services cost the firm approximately $1.00 per carlot for all species.[46] The cattle and calves bought and sold by Lawler Bros. in 1932 averaged approximately 35 head to the car.[47] The Secretary's allowance per head for cattle and calves for management costs was $.0350. Applied to the cattle and calves actually handled by Lawler Bros. in 1932, this allowance would

[46] Twenty percent of $28,222 equals $5,644.40. $5,644.40 divided by 5,616 (cars and car equivalents) equals approximately $1.00.

[47] Respondents' Exhibit 12, Sched., shows that Lawler Bros. bought and sold 4,520 carlots or carlot equivalents, containing 158,140 cattle and calves.

amount to $1.22 per carlot. Thus, it appears that the Secretary's allowance for management as applied to the cattle and calves handled by Lawler Bros. in 1932 amounts to approximately 22 cents per carload in excess of the amount which Mr. Lawler testified should be allocated to the cost of management.

It is clear that the Secretary's allowance for management gives the owners an amount over and above management wages. If they are entitled to the *pure profit* for which appellants contend, then the order of the Secretary makes ample provision for such profit.

A serious question arises, however, as to the extent to which the owner of a market agency is entitled as a matter of law to a pure profit. The economic justification for such a profit is that it is compensation for the risk incurred by the entrepreneur.[48] In the case of a business enterprise

[48] See Taussig, "Principles of Economics," Volume II, p. 193:

"Another view, in some respects similar, separates business profits from wages by considering as wages that amount which the individual would have been paid if hired by some one else. An independent business man's actual earnings are likely to exceed that sum; the excess is business profits. Here emphasis is put on the element of risk. Profits differ from wages in that they are the result of the assumption of risk and the reward for that assumption."

Cf. Fisher, "Elementary Principles of Economics," p. 457. Compare Hardy, "Risk and Risk Bearing," pp. 32–41. Appellants appear to recognize that this is the basis for the allowance of pure profits. See particularly p. 78 of appellants' brief.

which requires the use of substantial amounts of capital the necessity of an allowance to compensate for risk is obvious. The owner of a market agency, however, is engaged in the performance of a personal service. The business requires little capital and the element of risk is of slight importance. Although appellants refer to the hazards which threaten the owners of market agencies, it is clear that these hazards involve risk only in the sense that they make future earnings problematical. They do not threaten the loss or destruction of property or capital embarked in the enterprise. In that respect the owner of a market agency is more analogous to a doctor or a lawyer or any other person engaged in rendering personal services than to the entrepreneur of economic theory.

Indeed, it may be seriously doubted if the concept of pure profit is capable of rational application to such a situation as here presented. Appellants contend an allowance for pure profit is necessary as an "incentive to ownership" (appellants' brief, p. 76). But such an incentive defies measurement. Must the allowance of pure profit be high enough to persuade all of the present owners to continue in business? If it is fixed at that point, will it not attract new owners into the field with consequent diminution of profits and demand for higher rates?

Appellants suggest that pure profit should be measured by the difference between the amount

which an owner actually withdraws from the business and the amount which he could earn working as a manager for some one else (appellants' brief, p. 77). There is no adequate criterion of what an owner could earn if he worked as a manager for some one else except the salaries of such managers as are employed in arm's length bargaining, and the Secretary has made an allowance for management which exceeds the unit costs of such salaries. Clearly, the appraised values placed on the services of owners by the committee appointed by appellants cannot serve as such a criterion. These appraisals were made in complete disregard of the actual possibilities of employment elsewhere, or of the volume of business done by the owner, or of his success in conducting his business.[49] The mere fact that in many instances services were appraised at twice the amount which the owners actually withdrew from their firms is alone sufficient to discredit the appraisals as a test of pure profit. It cannot be assumed that an owner will continue to run his own business, particularly in view of the risks which appellants insist exist, for compensation only one-half as great as he could obtain by working for another person.

Appellants seem to assume that because analysis of the abstract concept of profit discloses that it may include, in certain circumstances, an element of pure profit, that is, an amount over and above

[49] See the discussion of these appraised values on pages 73–75, *supra*.

all costs including the wages of management, the owner of a market agency has a legal right to rates high enough to produce such a pure profit. This assumption has no basis in either legal or economic theory. Economists do not regard a *pure profit* as either an inevitable or a necessary element in the compensation of the enterpreneur. This is shown by the remarks of Gustav Cassel, from whose discussion of pure profit appellants apparently have largely derived their argument on this point. In his *The Theory of Social Economy, New York,* 1924), Cassel, after defining pure profit, says (p. 168):

> * * * *However, it is only in a relatively few cases that the employer's profit is very large.* Most of them make a pure employer's profit only during favourable conjunctions. *As a rule, perhaps, the returns hardly suffice to cover all the costs in the broader sense in which we have taken the word here.* * * *
>
> *There are, of course, no rules as to the extent of this kind of profit. It is not a normal thing,* but a specific element of the individual business. It is often an outcome of sheer accident: for instance, some development of the market that is especially good for this particular business, on which the employer has had no influence. It varies a good deal, as a rule, with conjunctures in the relevant branch of trade. * * * [Italics supplied.]

It seems clear that the owners of appellants have no legal right to insist that rates be fixed high enough to guarantee to each of them a profit of this abnormal, uncertain, and speculative nature.

The usefulness of the concept of pure profits in abstract economic analysis is not in issue, but the attempt of appellants to apply the concept to the rate-making problems presented by this case leads only to confusion. Whether the Secretary included in his allowance for profit an amount for management wages which should properly have been classified as a cost, and whether in making the allowance he should have distinguished between management wages and pure profit, are questions of no practical importance. The fact is that the allowance made by the Secretary for management is adequate to cover not only management wages but any profits to which appellants are entitled as a matter of law.

IV

THE RATES FIXED BY THE SECRETARY ARE NOT CONFISCATORY OR UNREASONABLE

Appellants contend that "the rates prescribed by the Secretary are confiscatory of the business, property, and services of each appellant and violative of the Fifth Amendment of the Constitution" (appellants' brief, p. 114).

It seems doubtful if this case presents any issue of confiscation in the strict sense of that word. The business of appellants consists of performing personal services. The amount of capital required

for the business is small, and there is no dispute in this case as to the rate of return which the Secretary has allowed on that capital.[50]

In the case of an enterprise which involves the use of physical property or capital, the test of confiscation may be stated as follows: A rate is confiscatory if it will not produce a fair return upon the fair value of the property employed in the enterprise. This test is obviously inapplicable to the business of appellants. Indeed, it seems clear that a rate for personal service can never be confiscatory in the same sense in which a rate may be which fixes the return on physical property or capital. Certainly it cannot be true, as appellants suggest, that a rate for personal services is confiscatory merely because some of those performing such services may cease to do so if the rate is applied. Nor is it significant that some of those engaged in performing such service may be unable to do so at a profit under the rates prescribed. Appellants have no constitutional right to rates high enough to maintain all of them in business and to assure all of them a profit regardless of the econ-

[50] Both the accountant for the government and the accountant for respondents set up capital requirements for the following items: (1) sound value of furniture and fixtures, horses, yard supplies, and automobiles; (2) membership in the Livestock Exchange; (3) working capital to finance operations; (4) material and supplies' inventory (par. 148, Secretary's findings; R. 173). The Secretary allowed interest at 6% on fixed capital, except the value of exchange memberships, and at 7% on working capital (par. 153, Secretary's findings; R. 175).

omy and efficiency of their operation or of the reasonable value of the services which they perform.

Admittedly, if the Secretary of Agriculture prescribes rates which are unreasonable, those rates may be set aside, but to achieve that result it is not necessary to resort to the Fifth Amendment nor to the concept of confiscation. Section 310 of the Packers and Stockyards Act authorizes the Secretary to prescribe *reasonable* rates; if he prescribes rates which are in fact unreasonable, he exceeds his statutory authority and for that reason alone the rates must fall.

Appellees believe, however, that it makes no difference in this case whether the question be regarded as one of reasonableness or of confiscation.[51] In either event, the record does not support appellants' attack on the rates prescribed by the Secretary.

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[51] The view which is taken of this question may affect the scope of review to which appellants are entitled. If the question is merely whether the Secretary has exceeded his statutory authority, the Court will doubtless look merely to see whether his order is supported by substantial evidence. On the other hand, it is possible that if the constitutional issue of confiscation is involved, the Court will examine the record to see if the order is supported by the weight of the evidence. Appellees submit that it is immaterial which test is applied here, because the Secretary's order is supported not only by substantial evidence but by the weight of the evidence. In this connection it should be noted that appellants were accorded a trial *de novo* in the District Court and that court upon an independent consideration of all the evidence, including the evidence introduced in the District Court by appellants, adopted the findings of fact of the Secretary *in toto*.

Appellants cannot succeed in their attack on the rates which the Secretary has prescribed merely by showing that the Secretary considered evidence not properly admissible under the rules of evidence enforced in judicial proceedings or that there were certain errors in the reasoning involved in the determination of reasonable costs and profits or that the costs and profits determined to be reasonable were not as generous as appellants believed they should have been. See *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420. The ultimate question is whether the Secretary in prescribing the rates has acted so arbitrarily, capriciously, and unreasonably, that he has exceeded his statutory authority or has invaded the constitutional rights of appellants. It should be further noted that any attack which appellants make upon the Secretary's findings or upon the rates which he has prescribed must be sufficiently conclusive to overcome the admitted fact that those rates applied to the aggregate business of appellants in 1932 would have produced $493,491 in excess of the costs and profits found by the Secretary to be reasonable (R. 1179).[52]

[52] The rates fixed by the order which this Court upheld in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, if applied to the aggregate business of the market agencies involved in that case in the test year of 1925, would have produced a margin of $3.41 per car over and above the costs there found by the Secretary to be reasonable. The rates here prescribed by the Secretary as applied to the aggregate business of appellants in the test year of 1932 would have produced a margin of $4.46 over and above the costs found to be reasonable. (See Appendix B, *infra*, pp. 134–135.)

Before considering the evidence on which the claim of confiscation is predicated, appellees wish to call this Court's attention to the allegations in the pleadings by which it is sought to raise that issue. The allegations with respect to confiscation made in the petition and complaint first filed in the District Court by appellants are found on pages 20–26 of the record. They consist of statements with respect to the aggregate market experience of appellants in 1932 and the effect of the application of the prescribed rates to the aggregate business done by all appellants.[53] No facts were alleged tending to show that the rates prescribed by the Secretary were confiscatory *as applied to the business of any particular appellant* in 1932. When evidence was

[53] For example, it is alleged that: The petitioners in 1932 suffered an aggregate loss of $298,536 and if the rates prescribed by the Secretary had been in effect in that year, the aggregate loss would have been increased by $719,337 (R. 21). The rates prescribed by the Secretary, if applied to the aggregate business of petitioners in 1932, would have caused a reduction of 25.47 percent in the gross selling commission for that year, a loss of 32.59 percent, compared with the loss of 9.56 percent actually suffered under the rates then in force (R. 21). The rates prescribed by the Secretary are confiscatory if applied separately to cattle and calves, swine, and sheep or goats, and the rates fail to yield to the petitioners and to each petitioner a fair and compensatory rate for stockyards service rendered by the petitioners and by each petitioner, or a return commensurate in value with services rendered, and will not reimburse to petitioners the actual operating expenses nor the expenses held to be reasonable by the Secretary, incurred in the rendition of such services (R. 22).

tendered in the court below on the issue of confiscation, the government objected to its admission on the ground that the pleadings did not properly present that issue (R. 211–212). Appellants thereupon moved for, and were granted, leave to amend their petition and complaint by the addition of the following allegations (R. 209):

> Each petitioner on his or its own behalf charges that the facts alleged in the foregoing paragraphs as to market experiences apply to his or its own business without substantial variation from the market experiences; that his or its own business is conducted economically, efficiently, and at reasonable costs and with the exercise of sound business judgment as to costs and expenditures; that the rates, charges, and practices prescribed by said order and said supplemental order, if permitted to become effective and if enforced, will deprive him or it of his or its property and business without due process of law, and will deny to him or it the equal protection of the laws in violation of his or its rights under the Constitution and the laws of the United States; and that the said order and supplemental order are without warrant and authority of law and if put into effect and enforced will confiscate his or its property and business without due process of law and in violation of the rights guaranteed by the Constitution and laws of the United States.

This amendment did not cure the defects of the first pleading. The allegation of the amendment that the facts alleged in the original petition and complaint as to market experiences apply to the business of each petitioner is without meaning. Allegations with respect to aggregate losses and decreases in aggregate commissions cannot be mechanically applied to the business of a particular appellant; the experience of a particular appellant is not necessarily the same as the aggregate experience of all appellants.[54] The amended pleading does not allege any facts with respect to the operating costs or gross commissions of any particular appellant, nor any facts to support the conclusion that the business of each market agency is conducted "economically, efficiently, and with reasonable costs, and with the exercise of sound business judgment."[55] This Court has frequently disapproved attempts to raise the issue of confiscation by such vague and omnibus allegations. See *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 448; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163; *Beaumont Sour Lake & Western Railway Co.* v. *United States*, 282 U. S. 74, 88–89; *Public Service Commis-*

[54] Appellants' witness, Mr. Mudd, testified at the hearing before the district court that "there are no two firms operating on this market whose business can be said to be similar" (R. 234).

[55] Appellees do not object, as appellants suggest on page 127 of their brief, to appellants all joining as parties to a single suit; they object to appellants' failure to plead the ultimate facts upon which their claim of confiscation rests.

sion of Montana v. *Great Northern Utilities Co.* 289 U. S. 130, 136–137; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 487.[58]

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[58] In the recent case of *American Commission Co.* v. *United States*, 11 F. Supp. 965 (D. C. Colo. 1935), suit was brought by various market agencies engaged in business at the Denver Union Stockyards to set aside an order issued by the Secretary under the provisions of the Packers and Stockyards Act, prescribing a maximum rate schedule. Petitioners alleged, among other things, that the rates prescribed were confiscatory. These allegations were virtually identical with those employed in the amendment to the petition in this case. The District Court held that the pleading did not raise the issue of confiscation, saying (pp. 967–968):

"Confiscation is raised by paragraph 9 of the bill, wherein it is alleged generally that each petitioner in his own behalf says the facts set forth in the preceding paragraphs apply to his business equally, in so far as they relate to his business experience, and that each one conducts his business economically, efficiently, and at reasonable costs, etc. *The allegations are made jointly and not severally as to all the petitioners. There are no separate allegations of the situation of any individual plaintiff, nor of facts as to its invested capital, number of employees, or actual or reasonable cost of doing business, which, if true, would establish confiscation.* Such allegations standing alone are not sufficient in view of the disclosures of the record already referred to, especially when coupled with the admittedly competitive nature of the business.

"*To raise the issue of confiscation there should be, for the reasons stated, separate allegations of ultimate facts in respect to each plaintiff.* No attempt is made to explain these wide variations among the several firms in the cost of performing the same function. Obviously all cannot be efficient. General averages of the petitioners' outlays that go to make up the total cost of doing business, based only on actual experience, throw no light on the reasonableness of such charges; the efficiency or waste of any particular firm,

Appellants' attack on the rates prescribed by the Secretary is based primarily on eleven exhibits prepared by their accountant and introduced in evidence in the District Court (R. 259–296). The arguments based on these exhibits assume that the present costs of each appellant are reasonable and proper and that the Secretary must fix rates high enough to cover those costs and to provide a profit for the owner of the business regardless of the manner in which the business is carried on and the reasonable value of the services which it performs.

An examination of Exhibit 2 (R. 266–273), upon which appellants place much reliance, illustrates the essential weakness of their attack on the reasonableness of the rates prescribed by the Secretary.[57]

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nor are they helpful in determining what are fair allowances for a firm conducting its business fairly efficiently." (Italics supplied.)

[57] Exhibit 2 is not the only one of these exhibits subject to criticism. There are certain assumptions and mistakes in some of the others which indicate the care which should be exercised in drawing conclusions from the compilations which they contain. For example, Exhibit 1 (R. 259–265) compares the aggregate gross commissions received by appellants under present rates for the four months ending April 30, 1934, with the gross commissions which would have been received under the maximum rates prescribed by the Secretary, and derives a percentage of decrease from this comparison. It should be noted, however, that there is nothing to show that the receipts of live stock were normal in the four months of 1934 selected as the test period. Among other things, the use of a four months' test period does not take into account seasonal variations in the volume and character of the live stock arriving at the Chicago market. As it has been explained (pp. 42–43, *supra*), the income which will be

That Exhibit is designed to contrast the commissions actually earned by appellants in 1932, 1933, and the first four months of 1934 with the commissions which would have been earned under the rates prescribed by the Secretary, and the profit or loss of appellants for the same period with the profit or loss they would have incurred if the Secretary's rates had been in effect. In making these computations, appellants use two sets of cost figures, one set including the excessive and hypothetical appraisals of the value of owners' services and the other set excluding these appraisals. If this

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realized in the future from the application of the rates prescribed by the Secretary will depend upon the size of the consignments and the weight of the animals in the consignments which arrive at the Chicago market. It cannot be assumed that during the remainder of 1934 live stock arrived at the Chicago stockyards in consignments of compafable size or weight to the consignments which arrived in the four months used as the test period. Appellants' use of the four months of 1934 as a test period is patently inconsistent with their position that the Secretary should have used a longer period than one year for determining reasonable unit costs. It should be noted that the percentage of decrease in gross commissions, derived from Exhibit 1, is an essential part of the computations contained in Exhibit 2.

Exhibit No. 8 (R. 289) purports to compare the cost of operations with actual commissions and with the commissions fixed by the Secretary's order in the year 1932. The cost figures used in this comparison include the excessive and hypothetical appraisals of the value of owners' services which were not in fact actual expenses at all.

Certain of the exhibits, for example Exhibits 4 (R. 277), 5 (R. 280), and 6 (R. 283) make graphic representation based on data contained in Exhibit 2 and are subject to the same criticisms which are directed against that Exhibit.

Exhibit is to be given any probative force, it must be assumed that the actual costs incurred by appellants are reasonable, and they are entitled to rates sufficient to cover those costs together with an allowance for profit. It is no answer to say, as appellants do, that even with the salary appraisals excluded, the compilation shows that under the Secretary's rates, appellants as a whole would have suffered financial loss. Quite apart from the appraised values of owners' services, which are hypothetical and not actual expenses, the cost figures used by appellants include expenditures which the Secretary has found to be unreasonable and excessive. For example, some of appellants whose costs are used in this computation make expenditures of from $3.00 to $5.00 per carlot for the purpose of getting and maintaining business.[58] Appellants' Exhibit 10 (R. 295), which they assert shows that the elimination of firms handling a small volume of livestock would not affect their computations as to the profits which would be realized under the Secretary's rates (appellants' brief, p. 121), is subject to the same criticism. The cost figures used in Exhibit 10 are based on the excessive hypothetical appraisals of owners' salaries, as well as on excessive and unreasonable expenditures for the purpose of getting and maintaining business. Compilations which reflect such excessive and unnecessary expenditures afford no basis for an attack upon the

[58] See page 85, *supra*.

reasonableness of the rates prescribed by the Secretary nor support for the claim that they are confiscatory.

Some of appellants' exhibits discredit themselves by the extreme showing which they undertake to make. For example, the computations of losses made in Exhibit 2 which are based on costs which include the appraised value of the services of owners, show that even under the existing rates appellants have an aggregate loss for the years 1932, 1933, and 1934 (R. 273). Even when the hypothetical appraised salaries are eliminated from costs, the Exhibit shows that a large number of firms have operated at a loss under the present rates, thus indicating that the costs of these firms are excessive. Exhibit 8 (R. 289) also purports to show that even under the present rates appellants suffered an aggregate loss in 1932. To such proof the language of this Court in *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio,* 292 U. S. 290, may well be applied. There a utility in objecting to a rate-making order presented evidence tending to show that it had been operating in the past, without protest, under confiscatory rates. This Court stated (p. 312):

> The argument proves too much: the valuations are discredited by the teachings of experience. Men do not transact business without protest at confiscatory rates, at all events in the absence of extraordinary circumstances making submission to the loss

> expedient. If such circumstances exist, the appellant has not proved them. Nothing in the record lays the basis for a belief that the natural gas business in Ohio is unable to pay its way. That being so, what the public utility has done belies what it has said. We shall hardly go astray if we prefer the test of conduct.

See also *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 163.[59]

Finally, it should be noted that the argument with respect to confiscation made by appellants and the evidence which they offer in support thereof are similar to the arguments and the evidence offered by the market agencies in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420. There it was alleged that the rates prescribed by the Secretary did not "provide sufficient remuneration to repay the market agencies for the expenses incurred by them in rendering the services, and a

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[59] In *Union Stockyards Co. of Omaha, Ltd.* v. *United States*, 9 F. Supp. 864, the Court said with respect to evidence with a similar tendency (p. 883):

"Plaintiff's testimony is to the effect that its proper ties are worth some $15,000,000 and its net operating income derived from the rates it had fixed for itself was some $850,000, so that on the showing it would appear to have been voluntarily operating at a rate far below what it asserts to be a confiscatory rate. Likewise, it contends that it must have a reserve for depreciation, maintenance, and repairs far in excess of any reserve which it has ever set up on its own account. We think the testimony, by proving too much, overshoots the mark and must fail of the intended effect."

reasonable and just compensation for their own services, and the enforcement of the said order will have the effect of depriving the said market agencies, including these petitioners, of their property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States" (*Tagg Bros. & Moorhead* v. *United States,* R. 5–6). In support of this allegation, the market agencies introduced evidence similar to the evidence upon which appellants rely. The nature of this evidence is indicated by the following passage from the opinion of the District Court in that case (*Tagg Bros. & Moorhead* v. *United States,* 29 F. (2d) 750, 758):

> The accountants for the plaintiffs made up a number of sheets, which disclosed the amount of business done by each agency in 1925, of cost to each for salesmen's services, for salaries, for other help, for advertising, etc.; in fact, the expenses incurred by each firm in conducting its business during the year 1925; also sheets showing the profits and loss to each firm during that year, if the rates prescribed by the Secretary should have been applied. On that basis many of them would have suffered a loss, and but few of them would have made substantial profits. But the outlays for expenses included in those sheets were in many respects items which the Secretary found to be unnecessary in carrying on the business and excessive.

Despite these contentions and the evidence offered to support them, the District Court held in that case that the rates prescribed by the Secretary were not unreasonably low or confiscatory, and this Court affirmed that holding, saying (280 U. S. 420, 445):

> This conclusion of the lower court conforms, in our opinion, to the evidence.

V

THE SECRETARY PROPERLY DENIED THE PETITIONS FOR REHEARING

On February 7, 1934, thirty days after the entry of the Secretary's order, appellants filed with the Secretary a petition for rehearing, the allegations of which are summarized by appellants in their petition and complaint as follows (R. 9):

> * * * that the schedule of rates and charges prescribed in the Secretary's Order would cause reductions in revenues which would make it impossible for the petitioners to pay necessary operating expenses; that there have been increases in expenses resulting from the operation of the National Recovery Act and the Agricultural Adjustment Act; that the schedule of rates and charges as prescribed in the said Order of January 8, 1934, were not related to the cost of rendering service with respect to the different species and classifications thereof; that the petitioners desired to show that draft is a more equitable basis than consignment for the assessment of rates and

charges; that the petitioners desired to show that the prescribed rates were not consistent with the level of cost or the trend of cost; that under the rates and charges in effect during 1933 substantially all of the petitioners had operated at a loss; that the rates prescribed by said order would not permit the restoring of salaries to the levels desired by the administration; and that the rates prescribed would necessitate throwing out of employment a large number of people; that the petitioners desired to prove that the Chicago market and the petitioners were efficient in the handling and selling of live stock in 1933 and 1934; that the conditions which prevailed during 1933 constituted a greater change than had occurred in any twelve months period prior thereto.

On February 12, 1934, representatives of the Solicitor's office of the Department of Agriculture filed a reply to the petition for rehearing, setting forth reasons why the petition for rehearing should be denied (R. 191). On the same date appellants submitted certain data in support of the allegations of the petition (R. 191). After consideration of all matters submitted to him in connection with the petition for rehearing, the Secretary entered a supplemental order on March 12, 1934, denying the petition for rehearing and providing for certain changes in the schedule of maximum rates and charges provided in the previous order of January 8, 1934 (R. 191). The changes provided in the sup-

plemental order were all increases, and they related to light weight cattle, medium weight cattle, heavy weight cattle, hogs, and sheep (R. 186–188, 192–194). The effective dates of the order of January 8, 1934, and the supplemental order of March 12, 1934, were postponed at appellants' request until April 20, 1934, by successive orders of the Secretary (R. 10).

On April 9, 1934, less than a month after the entry of the supplemental order, appellants' filed an amended petition for rehearing, the allegations of which are summarized by appellants in their petition and complaint, as follows (R. 10):

> * * * That the rates and charges prescribed in said Order and said Supplemental Order would create a net reduction of twenty-five percent of gross income as compared with income derived from the tariff rates and charges of 1923 declared to be unreasonable; that such reduction in income would be confiscatory for the reason, among others, that the income to be produced by the schedules of said Order and said Supplemental Order would not produce gross income sufficient to pay the usual and necessary costs of doing business; that the said Order and said Supplemental Order and the schedules thereof were based on findings for the years 1931 and 1932, while during the years 1933 and 1934 decided and profound

> economic changes have occurred adversely affecting the market agencies at Chicago; that the record and figures for the years 1931 and 1932 afforded no sufficient basis for the orders and schedules of the Secretary; that legislation of Congress and the rulings and activities of Administrative agencies of the Government, particularly the Agricultural Adjustment Administration, brought about drastic reduction in the production and marketing of live stock, particularly hogs.

The amended petition for rehearing was denied by the Secretary on April 12, 1934 (R. 10).

Appellants contend that the denials of these petitions for rehearing were arbitrary (appellants' brief, pp. 96–108).

In considering this point and weighing appellants' contentions, the chronology of these proceedings is pertinent. It will be recalled that the hearing before the examiner designated by the Secretary commenced in Chicago on May 15, 1933, and continued from then until August 18, 1933, at which time it was adjourned to be resumed in Washington (R. 8). Further hearings for the taking of testimony were held at Washington, terminating finally on November 7, 1933 (R. 9). Full opportunity was accorded at all times to counsel for appellants for examination and cross-examination of witnesses and introduction of exhibits. On December 13, 1933, the matter was argued orally before the Secretary of Agriculture (R. 9).

On January 8, 1934, less than four weeks after the case was finally submitted to the Secretary on oral argument, the original order was entered providing that the new schedule of maximum rates should become effective in thirty days, or on February 7, 1934 (R. 188–189).

There are probably very few instances in the annals of rate making in which a rate-making body proceeded as expeditiously after the submission of the case as did the Secretary of Agriculture in the instant proceeding. The Secretary's order was entered only two months and one day from the date on which the last testimony was taken and less than four weeks after the oral argument. It would, indeed, have been extraordinary if changes of such a sweeping character had occurred in the short space of a month or two as to have required the Secretary as a matter of law to have reopened the case. The same may also be said with almost equal emphasis of the amended petition for rehearing filed April 9, 1934. A presumption may certainly be indulged that even within a space of five months (November, 1933, to April, 1934) no such sweeping economic changes could have occurred as were found by this Court to have occurred during the period (1928 to 1930) covered by the petition for rehearing involved in the case of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248.

The obvious fact is that most of the allegations made in the petitions for rehearing related to matters on which evidence was or could have been in-

troduced at the lengthy hearings before the Secretary in 1933. The National Industrial Recovery Act and the Agricultural Adjustment Act had both been enacted long before the close of the hearings in November 1933, and appellants could have offered in evidence at the hearings in 1933 speculations as to the possible effect on their businesses of these statutes just as readily as they could have offered such matters in evidence had a rehearing been granted early in 1934. Appellants were also free to introduce at the hearings in 1933 all the evidence that they desired with respect to the draft being a more equitable basis than the consignment for the assessment of rates and charges, and with respect to the reduction in the receipts of live stock during the year 1933. The most that could have been added to the record had a rehearing been granted early in 1934 would have been facts with respect to the receipts and other market experience of several additional months. Appellants certainly were not entitled to a rehearing merely to permit them to put in evidence which might have been offered at the hearing prior to November 7, 1933, and the allegations do not furnish any basis for a belief that any facts occurred between November 7, 1933, and the dates of the petitions for rehearing which as a matter of law appellants were entitled to require the Secretary to consider.

As for the allegations in the petitions for rehearing that the rates and charges prescribed would be

confiscatory, it is submitted that none of the facts alleged in the petitions for rehearing would, if proved to be true, establish as a matter of law that the prescribed maximum rates were confiscatory. In view of the above, it is submitted that it was not an abuse of discretion for the Secretary to deny the petitions for rehearing.

Notwithstanding the obvious failure of the petitions for rehearing to allege facts requiring a rehearing, the Secretary nevertheless gave appellants' requests careful consideration. The effective date of the original order was twice postponed while the first petition for rehearing was under consideration (R. 190). Moreover, after consideration of the first petition for rehearing the Secretary made an adjustment involving an increase of the maximum rates prescribed which, as applied to the business of the year 1932, would have had the effect of increasing appellants' income under the prescribed rates $160,000. Including the additional revenue resulting from this increase granted by the supplemental order of March 12, 1934, the rates as a whole would have produced as applied to the business of 1932 a margin of nearly half a million dollars over and above the reasonable costs and profits found by the Secretary (R. 1179). Thus a considerable margin of protection has been provided against any incidental errors which might have occurred in the determination of maximum reasonable rates and against injury which might otherwise

have resulted to appellants through the operation of normal fluctuations in economic conditions.

The decisions of this Court do not require rehearings as a matter of course upon the presentation to rate-making bodies of petitions alleging some changes in economic conditions, or speculations regarding future conditions. In *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248, this Court held that an order of the Interstate Commerce Commission should have been enjoined by the lower court upon a showing that a petition for rehearing (alleging radically different facts from those existing when the record before the Commission was closed) had been denied. In that case the record before the Commission had been closed in September 1928; a petition for rehearing had been presented in September 1930, and a second petition for rehearing had been presented in February 1931. Thus a period of two years had elapsed between the closing of the record and the filing of the first petition, two years which saw a change from the height of prosperity to the depth of depression. This Court, in holding that the carriers were entitled to a rehearing, stated (p. 261) that the record before the Commission "pertains to a different economic era and furnishes no adequate criterion of present requirements", and that (p. 262) the petitions did not present "the usual case of possible fluctuating conditions, but of a changed economic level." Obviously, that case cannot apply here.

If there were any doubt about the inapplicability of that case, it would be dispelled by the case of *United States* v. *Northern Pacific Railway*, 288 U. S. 490. In that case the Circuit Court of Appeals (on a record which showed that the record before the Interstate Commerce Commission had been closed on January 15, 1930, and a petition for reopening had been filed with the Commission on February 3, 1932) held that the decision in the *Santa Fe* case required a reopening, and that, because of the Commission's denial of the petition to reopen, the order could not be sustained. In reversing that judgment, this Court said (at page 494):

> The decision in the *Santa Fe* case is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier revenue. The rule announced, while intended to safeguard substantial rights of the railroads, may not be invoked where its application would disenable the Commission to protect the interest of the public.
>
> Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligency in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a

> favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order.

It is submitted that under the holding of this Court in the *Northern Pacific* case, the Secretary was clearly justified in denying appellants' petitions for rehearing.[60]

Appellants in their brief (p. 98) quote from the opinion of this Court in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 444, to the effect that the Secretary has the power and the duty to modify his order if new evidence warrants the change. The government is wholly in accord with this pronouncement and welcomes its application to the present case inasmuch as the two petitions for re-

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[60] Petitions for rehearing somewhat similar to the ones involved here have been made in other rate proceedings recently held under the Packers and Stockyards Act, and have been denied by the Secretary. In four of these proceedings the rate orders have been challenged in district courts on the ground *inter alia* that it was error to deny the petitions for rehearing. In each case, however, the order of the Secretary has been sustained by the district court, and the denial of the petition for rehearing has, in each case, been expressly upheld. *Union Stock Yards Company of Omaha* v. *United States*, 9 F. Supp. 864, 871, 873; *Morgan* v. *United States*, 8 F. Supp. 766; *St. Joseph Stock Yards Co.* v. *United States*, 11 F. Supp. 322, 324–325; *American Commission Co.* v. *United States*, 11 F. Supp. 965, 972.

hearing allege no substantial facts which were unavailable to appellants at the hearing before the Secretary. Nothing in those petitions constitutes "new evidence" within the meaning of this Court's pronouncement in the *Tagg Bros. & Moorhead* case.

Appellants refer (appellants' brief, pp. 99–107) to certain publications of the Department of Agriculture with reference to the Agricultural Adjustment program and its effect upon the livestock supply of the country. None of the excerpts quoted has any bearing upon the question of whether the Secretary arbitrarily denied the petitions for rehearing. In the first place the Secretary's action in denying the petitions for rehearing must be judged as of the date of the denials. The question is whether or not the Secretary's action was arbitrary in view of the allegations of the petitions for rehearing, and not whether certain things may or may not have happened subsequently which might have required the granting of later petitions for rehearing which might have been (but were not) presented to the Secretary.

These excerpts which appellants have quoted from publications of the Department of Agriculture for the most part relate to the supply of livestock during the years 1934 and 1935. They refer to facts which had not occurred and could not be foreseen at the time the petitions for rehearing were presented.

But even if the matters quoted from the Department of Agriculture publications are given full

consideration, they have no bearing upon the lawfulness of the Secretary's orders. Not a fact appears from the quoted excerpts tending to show increased unit costs for handling livestock at the Chicago stockyards. It is submitted that generalized statements about livestock trends, such as appellants have referred to at pages 99 to 107 in their brief, even though coming from official publications, have no bearing whatsoever upon the question of the reasonableness of the prescribed rates for the business of the Chicago market agencies.

But even if appellants were able to refer to pertinent facts outside the record which have occurred *subsequent* to April 9, 1934 (the date the last petition for rehearing was presented), such facts on the present record would not constitute reasons for enjoining the enforcement of the prescribed rates, because as to such facts (if any such did exist) appellants have never petitioned for a rehearing. While the government emphatically contends that nothing which appellants have argued establishes, or even tends to establish, the unreasonableness of the prescribed rates, nevertheless if appellants were able to point to any drastic changes in economic conditions that they might contend have occurred in the latter part of 1934 or in 1935, reference to such facts would not be pertinent in judging the fairness or lawfulness of the Secretary's denial of the petitions for rehearing filed early in 1934. Any facts which may have oc-

curred subsequently are wholly immaterial in this proceeding. Appellants have never filed with the Secretary of Agriculture a petition for rehearing based upon any facts alleged to have occurred since April 9, 1934. If facts have occurred since that date which entitle appellants to a rehearing, an administrative remedy is available.

It is respectfully submitted that the Secretary was fully warranted in denying both petitions for rehearing and that such denials were not arbitrary and did not constitute an abuse of discretion.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be affirmed.

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APPENDIX A

Title III of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159 (7 U. S. C., Title 7, Secs. 181–229) provides in part as follows:

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

* * * * *

SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request without discrimination, reasonable stockyard services at such stockyard * * *.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or dis-

criminatory rate or charge is prohibited and declared to be unlawful.

* * * * *

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

* * * * *

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment

of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

* * * * *

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If, after hearing, the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enfrocement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

APPENDIX B

COMPARISON OF MARGIN OVER COSTS PRODUCED BY RATES FIXED IN *TAGG BROS. & MOORHEAD* v. *UNITED STATES* WITH THE MARGIN PRODUCED BY THE RATES PRESCRIBED BY THE SECRETARY IN THIS CASE

	Omaha	Chicago
Costs found reasonable by Secretary:		
Cattle and calves	[1] $.49074	[2] $.4297
Hogs	[1] .14071	[2] .1323
Sheep	[1] .05800	[2] .0485
Test Year	(1925)	(1932)
Volume in car lot equivalents, test year	[3] 128,619	[4] 148,030
Total costs for market for test years	[5] $1,544,683	[6] $1,714,241
Total revenues produced by Secretary's rates	[7] 1,983,433	[8] 2,374,338
Total margin between cost and income produced by rates	$438,750	$660,097
Margin per car	$3.41	$4.46

[1] These per-head figures are arrived at by dividing the per-car cost as found by the Secretary (*Tagg Bros.*, etc., R. 36) by the number of head of each species equivalent to a carload, namely, by 27 cattle, 70 hogs, and 225 sheep. (*Tagg Bros.*, etc., R. 33.)

[2] (R. 180.)

[3] (*Tagg Bros.*, etc., R. 828, 829.)

[4] Gov. Ex. 49, 186.

[5] Arrived at by applying against the number of cars of each species received in 1925 the costs found reasonable by the Secretary:

71,422 cars of cattle (*Tagg Bros.*, etc., R. 828, 829) @ $13.25 (*Tagg Bros.*, etc., R. 36)		$946,342
46,275 cars of hogs (*Tagg Bros.*, etc., R. 828, 829) @ 9.85 (*Tagg Bros.*, etc., R. 36)		455,809
10,922 cars of sheep (*Tagg Bros.*, etc., R. 828, 829) @ 13.05 (*Tagg Bros.*, etc., R. 36)		142,532
128,619	Total	$1,544,683

[6] Cooperative volume and country volume out.

2,502,596 head of cattle (Gov. Ex. 49, 186) @ $.4297 (R. 180)	$1,075,365.50
3,883,537 head of hogs (Gov. Ex. 49, 186) @ $.1323 (R. 180)	513,791.95
2,579,048 head of sheep (Gov. Ex. 49, 186) @ $.0485 (R. 180)	125,083.83
Total	$1,714,241.28

[7] (*Tagg Bros.*, etc., R. following 798, Ex. 105.)

[8] It is stipulated (R. 1179) that Secretary's order will produce for the market as a whole $493,941 more than the cost and profit. This amount, $493,941, added to $1,880,396.80, the cost and profit, gives $2,374,337.80. The total cost and profit is arrived at as follows:

2,502,596 head of cattle (see above) @ $.4687 (R. 180)	$1,172,966.75
3,883,537 head of hogs (see above) @ $.1463 (R. 180)	568,161.46
2,579,048 head of sheep (see above) @ $.0540 (R. 180)	139,268.59
Total cost and profit as per finding	$1,880,396.80

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It should be noted that in *Tagg Bros. & Moorhead* v. *United States* the Secretary made no findings as to reasonable profits per unit. He made findings as to reasonable unit costs and then fixed rates high enough to cover those unit costs and to provide a margin for profit (*Tagg Bros.* etc., R. 23–42).

In the instant case the Secretary made a finding, not only as to reasonable unit costs but also as to reasonable profits per unit (R. 178–181), and then fixed rates sufficient to produce in the test year a margin of approximately $500,000 over and above the costs and profits found to be reasonable (R. 1179).

APPENDIX C

UNIT COSTS AND PROFITS FOUND TO BE REASONABLE BY THE SECRETARY OF AGRICULTURE

	Cattle and Calves	Hogs	Sheep
Salesmanship	$.1667	$.0414	$.0148
Yarding Salaries	.0725	.0280	.0085
Yarding Expenses	.0075	.0004	.0002
Office Salaries	.0750	.0250	.0099
Office Expenses	.0375	.0150	.0055
Business Getting and Maintaining	.0390	.0120	.0050
Administrative and General Expenses	.0150	.0055	.0030
Insurance	.0085	.0025	.0015
Interest	.0080	.0025	.0010
Total cost	.4297	.1323	.0485
Profit:			
To cover management	.0350	.0125	.0050
To cover uninsurable risks	.0040	.0015	.0005
Total reasonable cost and reasonable profit	.4687	.1463	.0540

U. S. GOVERNMENT PRINTING OFFICE: 1936